REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Exchequer,

WITH

A TABLE OF THE NAMES OF CASES

AND

A DIGEST OF THE PRINCIPAL MATTERS.

BY

C. J. GALE, Esq. of the Middle Temple,

BARRISTER AT LAW.

VOL. II.

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JUDGES

OF THE

COURT OF EXCHEQUER,

During the Period of these Reports.

The Right Hon. Lord ABINGER, C. B.
The Right Hon. Sir JAMES PARKE, Knt.
The Hon. Sir WILLIAM BOLLAND, Knt.
The Hon. Sir EDWARD HALL ALDERSON, Knt.
The Hon. Sir JOHN GURNEY, Knt.

ATTORNEY GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

IN

Easter Term, 1836.

REGIL *v.* GREEN.

DEBT in the sum of 500*l.*, for money lent, money paid, and on an account stated.

Pleas—first, *nunquam indebitatus;* secondly, as to the said sums of money lent, and money paid, that they were so lent for the purpose of paying, and so paid respectively, to J. R., the master of the said ship, for the repairs of a certain ship or vessel called the *Wilberforce*, then being in parts beyond the seas, to wit, at *Laguna*, in *Mexico*, in *South America*, and out of the dominions of our lord the king, on and in the progress of a certain voyage, from *Liverpool* to certain parts beyond the seas, to wit, to *Sisal Campeachy* and *Laguna* aforesaid, and from thence to her port of discharge at *Liverpool* or *London*. And the defendant further saith, that the said several sums of money were not, nor was any part thereof, lent or paid, or the debt in respect thereof contracted, or any part thereof, upon the security or liability of the defendant; but the plaintiff having then refused to accept in payment of the said sums bills of exchange on the several owners of the said ship; and the said J. R. then being master of the said ship, and having no funds or credit of his own in *Mexico* aforesaid, and the plaintiff being anxious to obtain large and exorbitant bottomry interest in that behalf, to wit, on the 1st of *December*, 1833, a certain agreement was made between the plaintiff and the said J. R., so being master as aforesaid, for the said defendant, whereby it was agreed that the said J. R., so being master as aforesaid, should give to the plaintiff and one N. C., then being the agent of and in trust for the plaintiff, a certain instrument of bond and hypothecation, and a bill of maritime risk and bottomry, whereby, in consideration of the said sums so lent and advanced and so paid respectively, the said *British* ship, freight, and cargo, were to be responsible for the said sums so lent and advanced and so paid as aforesaid, and principal and additional premiums of risk and sea-exchange, amounting in the whole to a large sum of money, to wit, the sum of 500*l.*, payable under the terms and conditions as hereinafter mentioned. [The plea then set forth a bottomry-bond given by J. R. to the plaintiff and N. C., in corformity with the agreement.] *Verification.*

Semble, that though immaterial matter may not make a plea double; a traverse of both the material and immaterial parts of the plea is objectionable on special demurrer, as tending to make uncertain what is the substantial issue to be tried.

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REGIL
v.
GREEN.

Replication to the second plea.—That the several sums therein mentioned were respectively by the plaintiff lent and advanced and paid, as in the declaration mentioned; and the said debt in respect thereof was contracted upon the security and liability of the defendant, and that the said supposed agreement between the plaintiff and the said J. R., so being master as aforesaid for the defendant, was not made as in the said plea alleged, and that the said supposed instrument of bond, &c. was not made as in the said plea alleged. Conclusion to the country.

Special demurrer, assigning for causes that the replication is double in this, to wit, that it is therein alleged that the several sums in the second plea mentioned, were lent, advanced, and paid, and the debt in respect thereof contracted upon the security and liability of the defendant; and, secondly, that the agreement was not made as in the plea mentioned; and, thirdly, that the bond, &c., was not made as in the plea mentioned, and thereby the plaintiff puts in issue several points, matters, and things, and attempts vexatiously to compel the defendant to proceed to the defence of several things more than by law he is entitled to do.

Wightman, in support of the demurrer.—The plaintiff has pleaded over, and therefore cannot now object that the plea amounts to the general issue, that objection can be taken only on special demurrer. [*Parke*, B.—Your plea amounts to a double general issue; it contains two defences, both of which the replication answers. Lord *Abinger*.—You have mixed up two defences together, and he was obliged to answer both, or leave so much unanswered as would entitle the defendant to judgment *non obstante veredicto*.] If the plaintiff had taken issue on the first allegation in the plea, and had succeeded in shewing that the money was lent, &c. upon the personal credit of the defendant, the rest of the plea would be immaterial. [*Parke*, B.—The better plan would be to strike out the special plea, and go to trial upon the general issue.] The plaintiff ought to have known that an issue on the first averment would have disposed of the cause, he might have objected to any improper matter in the plea by a special demurrer.

W. H. Watson, contrà.—All that part of the plea which relates to the advances having been made on the credit of the owners is immaterial. In order to relieve the owner from responsibility by an hypothecation-bond, the money must have been actually advanced on the hypothecation-bond at the time it is executed. The case of the *Augustine* (*a*). Matter may suffice to make a pleading double, though it is ill pleaded, but not if it be immaterial. The argument in support of this distinction is thus stated in Serjt. Stephen's Treatise on the Principles of Pleading (*b*). The object of the rule against duplicity is the avoidance of several issues. "Now whether a matter be well or ill pleaded, yet if it be sufficient in substance, so that the opposite party may go to issue upon it, if he chooses to plead over, without taking the formal objection, such matter tends to the production of a separate issue; and is on that ground held to make the plea double. On the other hand, if the matter be immaterial, no issue can properly be taken upon it; it does not tend, therefore, to a separate issue, nor, consequently, fall within the rule against duplicity (*c*)." The latter plea being

(*a*) 1 Dods. Adm. Rep. 282.
(*b*) 3rd edit. p. 261.
(*c*) The doctrine thus laid down seems open to some question, unless by "matter

immaterial, and mere surplusage, a traverse of it does not make a double issue.

Wightman, in reply.—It may be very true that a statement of an immaterial fact would not make a plea double, but it does not follow that a traverse of such a fact is immaterial; the plaintiff, by his traverse, treats it as material: there are two issues, both of which the plaintiff may contend are material, and the inconvenience under which the defendant may be placed is made the ground of objection in this special demurrer.

Lord ABINGER, C. B.—I think, in strictness, the defendant is entitled to judgment; but the plaintiff ought certainly to have liberty to amend.

PARKE, B.—I think the objection, that the replication attempts to put in issue more matters than the defendant ought to be called upon to prove, is sufficiently pointed out at the conclusion of the special demurrer. It seems to me that the objection is well founded, that there are too many matters traversed. The better mode to adopt would be to strike out the special plea, and go to trial on the general issue.

ALDERSON, B., and GURNEY, B., concurred.

Leave to amend.

immaterial" is understood matter merely surplusage. The above learned author seems to intimate an opinion that the insufficiency of matter, though relied on in a plea, will prevent its being double. "The case (*Grenlefe*, Dyer, 42 *b*,) does not explicitly decide that when two several matters are not only pleaded, but *relied upon*, the immateriality of one of them shall prevent duplicity; but the manner in which the judges express themselves seems to shew that the doctrine goes to that extent: and there are authorities the same way." (3rd edit. p. 261.) The rule laid down in Bac. Abr. Pleading, K 2, clearly confines the rule to matter which "is really no plea at all, or such a one on which no issue could be taken, then it could only be surplusage." *The Countess of Northumberland's* case, 5 Rep. 97 *b*. decides only that matter not traversable will not make a plea double. To the same effect is *Grenlefe's* case, Dyer 42 (*b*). Serjt. *Stephen* also alludes with disapprobation to the *dictum* of *Doddridge*, J. in Popham 186, *Calfe* v. *Nevil*, that if several matters be pleaded in bar, the plea is double, though one of them only is material. But if they are pleaded as defences, that rule seems to be most consonant with the spirit of the principles of pleading, which condemns any ambiguity tending to embarrass the other party in meeting the case presented to him. If the additional fact proffered in the plea be an issuable fact, the legal effect of which is in the slightest degree doubtful, why should the plaintiff be obliged, under the peril of the consequences, to determine whether it is of any avail, when there is one matter in the plea which clearly calls for an answer? This point of view seems supported by the ruling in the case above, the Court deciding, not that the objection was, strictly speaking, duplicity, but that the replication tended to embarrass the other party, in not pointing out clearly on what issue the plaintiff meant the case to turn; and the same reason seems to shew that a plea would be vicious which clearly tendered a double issue, though one should, whether well or ill pleaded, ultimately turn out to be insufficient to conclude the case.

Exchequer.

HARRIET REEVES, Executrix, v. HEARNE.

An action cannot be maintained upon an agreement which is a mere unexecuted accord of a previous debt.

DEMURRER. Assumpsit. The third count was as follows:—And whereas, also, after the death of the said *William Reeves*, to wit, on, &c., the defendant was indebted to the plaintiff, as executrix as aforesaid, in 11*l.* 5*s.* 6*d.* for goods sold and delivered by the said *William Reeves*, in his lifetime, to the defendant, at his request; and the last-mentioned sum being due and in arrear heretofore, to wit, on the day and year last aforesaid, in consideration thereof; and that the plaintiff, as executrix as aforesaid, at the defendant's request, had agreed with him to accept a certain suit of clothes, to be made and provided by the defendant, for one *John Richmond*, the plaintiff's servant and traveller, in part discharge and satisfaction of the said debt of 11*l.* 5*s.* 6*d.*, to wit, to the extent of the price and value of such suit of clothes, (the said plaintiff then and from thence hitherto and still being indebted to the said *J. Richmond*, in a large sum of money, to wit, the sum of 50*l.* for wages then due and owing to the said J. R., as such clerk and traveller as aforesaid, and the said J. R. having then agreed to receive, and having from thence hitherto been willing and still being willing to receive, the said suit of clothes in part payment and discharge of the said sum of 50*l.* to the extent of the price and value of such suit of clothes,) and also in consideration that the plaintiff, as executrix as aforesaid, at the defendant's request, had agreed and promised him to forbear and give him a reasonable time for the payment of the remainder of the said debt of 11*l.* 5*s.* 6*d.*, he the defendant undertook and then promised the plaintiff, as executrix as aforesaid, to make and provide the said suit of clothes for the said J. R., upon the terms aforesaid, within a reasonable time then following, and to pay her the remainder of the said debt of 11*l.* 5*s.* 6*d.* at the expiration of a reasonable time, for such forbearance; and the plaintiff, executrix as aforesaid, avers that she, confiding in the defendant's last-mentioned promise, hath always been ready and willing to accept such suit of clothes, in such part satisfaction and discharge as aforesaid; and the plaintiff did forbear and give time for the payment of the said debt of 11*l.* 5*s.* 6*d.* for a reasonable time from the making of the said agreement with the defendant, and the time for making and providing the said suit of clothes, and paying the remainder of the said debt of 11*l.* 5*s.* 6*d.* upon the terms aforesaid, have elapsed, of all which promises the defendant, on, &c. had notice, and was then requested by the plaintiff, as executrix as aforesaid, to make and provide the said suit of clothes and pay the remainder of the said last-mentioned debt, upon the terms aforesaid. Yet the defendant hath not made or provided the said suit of clothes, or any part thereof, or paid any part of the said last-mentioned debt, in the manner or upon the terms aforesaid, or otherwise, &c.

The defendant pleaded the statute of limitations, in a form that was specially demurred to.

N. R. Clarke, for the plaintiff, was called upon to support the declaration.—The declaration shews a sufficient consideration for the substituted contract entered into by the defendant.

Lord ABINGER, C. B.—Suppose the Statute of Limitations out of the ques-

tion, it appears a contract has been made to receive payment, partly in clothes, and partly in cash; there is no new consideration, and if the contract is not performed, the original debt is not extinguished.

PARKE, B.—This declaration states nothing more than an accord unexecuted; there is nothing to interfere with the right of action on the original debt, the contract of accord not being performed. In *Lynn* v. *Bruce* (*a*), the judgment was arrested on this ground. Even if *Richmond*, to whom the clothes were to be given, was a party to the contract, it would be an extinguishment of the debt only *pro tanto*, and the original debt would still exist as to the residue.

ALDERSON, B., and GURNEY, B., concurred.

Judgment for the defendant.

Mansel appeared for the defendant.

(*a*) 2 H. Bl. 317.

MILLS *v.* JOSEPH BARBER.

ASSUMPSIT by an indorsee against the acceptor of a bill of exchange. *Plea.*—That the defendant accepted the bill for the accommodation of *Samuel Barber*, and that he did not give, nor did he, the defendant, have or receive, any value or consideration for his, the defendant's, accepting or paying the said bill of exchange; that the said *S. Barber* indorsed the said bill to the plaintiff without any value or consideration, and the said *Samuel Barber* and the plaintiff have always respectively held the said bill without any value or consideration. Verification.

The fact that a bill of exchange was accepted for the accommodation of the drawer, is not sufficient to call upon an indorsee to prove that he gave value for it.

Replication.—That the said *Samuel Barber* indorsed the said bill of exchange to the said plaintiff for a good and valid consideration. Conclusion to the country.

At the trial, before *Alderson*, B., at the sittings in *Middlesex* in last term, the defendant was called up to begin, and give evidence that the plaintiff had not given any consideration for the bill; he refused, and the learned judge directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit.

Humfrey obtained a rule accordingly, on the ground, that the original want of consideration for the acceptance of the bill being admitted by the replication, it was for the plaintiff to show he had a new title by value given for the indorsement.

Theobald shewed cause.

Humfrey supported the rule (*a*).

Cur. adv. vult.

Lord ABINGER, C. B., delivered the judgment of the Court:—This was an action against the acceptor of a bill of exchange. The defendant pleaded, that

(*a*) The cases cited in *Simpson* v. *Clark*, *ante*, vol. 1, p. 237, were again advanced, and Lord *Abinger's* judgment in that case; *Percival* v. *Frampton*, 2 Cr. Mee. & R. 183, was also cited.

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MILLS
v.
BARBER.

the bill of exchange was given without consideration, and for the accommodation of the drawer, and indorsed over to the plaintiff without consideration. The plaintiff replied that he had given consideration for it; and upon that the question arose. At the trial, both parties were unwilling to act. The plaintiff stood on his right, and insisted, that the possession of the bill itself, under such circumstances, was *primâ facie* evidence of consideration, and that he was not bound to prove he had given consideration. The defendant contended, the issue was cast on the plaintiff, because the affirmative was on him. Neither party choosing to act, the learned judge directed a verdict to be entered for the plaintiff, reserving to the defendant leave to move to set it aside. The question has since been fully argued. It is a question rather of practice than of law.

No doubt the rule of law is, that a plaintiff who has not given consideration for an accommodation-bill before it comes to his hand, cannot recover on it; but the question is, which party is to give evidence. It was argued by Mr. *Humfrey*, that all the cases shew that where the defendant proves the bill was an accommodation-bill in the first instance, there the *onus probandi* was cast upon the plaintiff, to shew he had given consideration. I must own, as far as my knowledge of the practice goes, that that was the course; and I have never known the point mooted except in the cases cited by Mr. *Humfrey;* and I must observe that it had grown to be a practice for the defendant to give notice to the plaintiff, calling upon him to prove consideration; and it was a very general practice, where the plaintiff had received such notice, to call on him, in the first instance, to prove consideration; but I have known instances where the plaintiff refused to do that, and merely proved the note; and then the defendant having shewn it was an accommodation-bill, the plaintiff proved consideration.

The judges have taken this point into consideration, it having become more important to settle the practice since the new forms of pleading have been adopted. The Court of King's Bench has been consulted; and my brothers *Littledale* and *Patteson*, on consideration, are induced to withdraw their opinions as expressed in the case of *Heath* v. *Sansom* (*b*). In *Simpson* v. *Clarke* (*c*), which Mr. *Humfrey* cited, undoubtedly I stated, what I now state, that the practice was for the holder to shew he had given consideration; and I cannot say that I have given up that opinion without some hesitation on the effect of a change of practice upon public convenience. At the same time, I am not inclined, on such a question, to maintain my own opinion against that of so many of the judges. It will be observed, in *Simpson* v. *Clarke*, I expressly stated, that was not the point on which the case was decided. I gave that opinion undoubtedly, and I did so in order to shew it was not my intention to decide the case then. I think I then made a distinction between cases of mere accommodation-bills and cases bottomed on fraud. There is a substantial distinction between them; for, where a bill is given for accommodation, the presumption is, that money has been raised on it, until the contrary be shewn. That argument was advanced by Sir *Frederick Pollock* in the case I have alluded to. If a man comes into court under no suspicion of fraud, but merely as the holder of an accommodation bill of exchange, he may be presumed to be a *bonâ fide* holder. The proof that the acceptor received no

(*b*) 2 B & Adol. 291. (*c*) Vol. 1, p. 237.

value for the bill, but that it was given for accommodation, is by no means a proof that money has not been raised on it. It was given for the express purpose that money should be obtained. If the case can be connected with some fraud, with something illegally done to obtain the bill from the parties, as that it has been clandestinely taken away, been lost or stolen, or something of that sort, then undoubtedly the *onus probandi* ought to be on the plaintiff, to prove that he gave consideration for the bill. The decision of this present case requires no other rule to be laid down than, that where no fraud appears at all, nor any suspicion of fraud, but the simple fact, on the part of the defendant, is that the plaintiff gave no consideration for the bill, but that it was an accommodation-bill, the law will not cast the *onus probandi* on the plaintiff. That seems to be the general opinion prevailing among the judges. My brothers, *Patteson* and *Littledale*, concur in opinion, that, in any case of fraud, the plaintiff is bound to shew he is the legal owner; in other words, to prove consideration. In this case, the *onus probandi* lay on the defendant, and he ought to have gone a step farther. We think it proper, however, there should be a new trial, on payment of costs. Rule absolute.

(His Lordship added—)

There are two or three other cases depending on the same point, wherein the Court comes to the same decision, and which are decided on the same grounds.

GOODCHILD *v.* PLEDGE.

DEBT, in the sum of 20*l.*, for goods sold and delivered, for board, lodging, and other necessaries, found and provided by the plaintiff for the servant of the defendant and at his request.

Plea.—That, before the commencement of this suit, and when the said sum of 20*l.*, in that count mentioned, became due and payable, to wit, on the 1st of *January*, 1836, the defendant paid to the plaintiff the said sum of 20*l.*, according to the defendant's said contract and liability, in the said first count mentioned. Conclusion to the country.

Special demurrer, on the ground that it ought to have concluded with a verification.

A plea to an *indebitatus* count in debt, that when the said sum of, &c., became due and payable, the defendant paid it, according to his contract and liability, should conclude with a verification.

Mansel, in support of the demurrer.—That this plea is introductory of new matter, and should have concluded with a verification, was decided in *Ensall* v. *Smith* (*a*). The only difference between that case and the present is, that, in this, the payment is alleged to have been made when the demand arose; but that is immaterial. The plea is analogous to that of *solvit ad diem*. [*Parke*, B. That is clearly new matter, introducing a performance of the condition of the bond.] The plaintiff would be under a difficulty in raising an issue on the fact of payment.

Ogle, contrà.—This case is distinguishable from that of *Ensall* v. *Smith*.

(*a*) 1 Cr. M. & R. 522.

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This plea does not introduce new matter; it traverses the allegation in the declaration, the non-payment of the sum of money at the day when it was due; proof of payment in satisfaction of an existing debt would not support this plea. [*Parke*, B.—The allegation of the breach is mere form, and cannot be traversed: the plea treats it as a matter of substance. Suppose the old plea of *nil debet* pleaded, would it not be sufficient to prove a delivery of the goods?] This plea shows there never was any right of action at all.

Lord ABINGER, C. B.—Your argument shews that if the plea is not bad on the ground pointed out, it is bad for another reason; it is contended, to avoid the objection, that the plea is the general issue.

PARKE, B.—I think the breach will be found to be mere form; if so, the plea confesses a debt which can be discharged only by an avoidance. The plea of *nunquam indebitatus* denies that there was at any time a debt.

ALDERSON, B.—The plea alleges payment of a debt, which it admits to have become due; it is therefore in confession and avoidance, and ought to conclude with a verification.

(Leave to amend on payment of costs; otherwise,)

Judgment for the plaintiff.

AUGERO *v.* KEEN and Another, Executors of GEORGE KEEN, deceased.

A bond was conditioned for the due performance by a parochial officer of his duties, "from time to time, and at all times thereafter, during such time as he should continue in his said office, whether by virtue of his aforesaid appointment, or of any re-appointment thereto, or of any such retainer, or employment, by or under the authority, or with the consent, or acquiescence of the said trustees, or their successors to be elected in manner named by the said act." It appeared that by the local act referred, the office, in question, was one of annual appointment, or election, and it was pleaded to be so.—*Held*, that the bond was not confined to the year for which the officer was appointed, but extended to every year in which he should continue in office by virtue of successive re-appointments. *Qu.*, whether it would apply to a case of a re-appointment, after having been out of office.

THE plaintiff declared, as clerk to the trustees for executing an act of Parliament of the 10th G. 4, (the Lambeth Watching and Lighting Act, 10 G. 4, c. cxxix.) on a joint and several bond, dated the 10th of July, 1830, given by the defendants' testator, together with *J. R. Pavey* and *H. Pugh*, to seven of the then trustees for putting the said act into execution, on behalf of themselves and the other trustees, appointed by the act, in the penal sum of 400*l.*, to be paid to the said trustees therein before named, or the survivor or survivors of them, or their or his attorney, executors, administrators, or assigns.

The plea craved oyer of the bond and of the condition. After reciting that at a meeting of the trustees under the act, held on the 10th of *July*, 1830, the said *J. R. Pavey* having been required to give good and sufficient security, by entering into a bond, with two sureties in the penalty of 400*l.* for the due execution of the said office, and for duly accounting for the monies to be collected and received by him therein, had agreed to give such security, and had accordingly together with the said *H. Pugh* and *Geo. Keen* entered into the above bond or obligation; the condition was, that if the said *Pavey* should from time to time, and at all times thereafter, during such time as he should continue in his said office of collector whether by virtue of his aforesaid appointment, or of any appointment thereto, or of any such retainer or employment by or under the said authority or with the consent or acquiescence of the said trustees, or

their successors, to be elected in the manner directed by the said act, or any seven or more of them duly, attentively, and faithfully execute and perform the said office, and use his best endeavour to collect, get in, recover, and receive the rates and assessments which should or might at any time or times thereafter during the then present or in any subsequent year, be made under or by virtue of the said act of Parliament, &c. (there were various stipulations for the faithful performance of the office, payment over of money, &c.), the bond should be void, or otherwise should remain in full force and virtue. The plea then alleged, that the said office of collector, in the condition mentioned, was the office of collector of the rates and assessments, constituted and maintained in and by the said act of Parliament, and that after the making of the act, and before the making of the said writing obligatory, to wit, on the 1st of *July*, 1833, the said trustees by writing under their hands in manner and according to the provisions of the act, did appoint the said *Pavey* to the said office of collector, in the condition mentioned, and under and by virtue of that appointment he did remain and continue in the said office, until and upon a certain day, to wit, until and upon the 10th day of *July*, 1834, being the next meeting of the said trustees, after the annual day of election of such trustees, as in the said act mentioned, when the said office, and duties, and employment of the said *Pavey* therein ceased and determined. The plea then went on to allege performance of all the terms of the condition during the said term that he the said *Pavey* remained in the said office of collector as aforesaid.

Replication.—That after the said *Pavey* had been so appointed to the said office of collector, as in the plea mentioned, and after the making of the said writing obligatory, and after the first year of his employment and duties in the said office had ceased and determined, and before the commencement of this suit, to wit, on the 9th of *July*, 1834, the said trustees at a meeting then duly held in pursuance of the said act of Parliament did by writing under their hands, in the manner and according to the provisions mentioned and contained in the said act of Parliament, re-elect and re-appoint the said *Pavey* to the said office of collector in the said condition mentioned, and the said *Pavey* did then accept the said office, in pursuance of such re-appointment, and continued to be and was retained and employed as such collector, by the authority and with the consent and acquiescence of the said trustees, from the time of his said re-appointment until the 10th day of *June*, 1835; the replication then alleged that after his re-appointment, and while he held the said office, and was so retained and employed therein as aforesaid, to wit, on the 11th of *July*, 1834, and on divers other days and times, between that day and the time when he finally ceased to be employed as such collector. After the said re-appointment, he committed breaches of the condition, by not paying over divers monies collected on account of the rates.

Special demurrer, pointing out several objections which were not argued.

In the margin, the following point was also stated, that the obligation of the bond only extended to the faithful performance by *Pavey* for one year. Joinder in demurrrer.

W. H. Watson, in support of the demurrer.—The obligation of the bond is limited to the due performance by *Pavey*, of the duties of the "said office," to which he was appointed, that is, the office of collector for one year. The 13th section of the local act directs how the officers are to be appointed. The

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collector is to hold office for one year and no longer. [*Parke*, B.—How do you get over those words "by virtue of his aforesaid appointment, or any re-appointment thereto."] Those words may be satisfied, by taking them as a provision for a new appointment within the year, in case of an invalid appointment. An appointment after the expiration of the year, would not be a re-appointment to the office he previously held. To what extent would the obligation otherwise extend; would it apply, if he had discharged the duties for a year, and then ceased for three years, and had then been re-appointed. [*Alderson*, B.—That would be a fresh appointment, not a re-appointment. *Parke*, B.—The words are, "during such time as he should continue in his said office."] Where an office is annual, to extend the obligation of such a bond as this, the language ought to be precise, and strong. In the *Liverpool Water Works Comp.* v. *Atkinson*(*a*), the condition of a bond recited that the defendant had agreed with the plaintiffs to collect their revenues, from time to time, for twelve months, and stipulated that at all times thereafter during the continuance of such his employment, and for so long as he should continue to be employed, he would justly account, &c.; it was held, that the obligation was confined to the period of twelve months contained in the recital. The observations of Lord *Ellenborough* and *Le Blanc*, J., are very strong, that the words extending the obligation to the full time of the party's employment, must be restrained by the reference to the duration of the office, to which he was originally appointed. To the same effect are *Hassell* v. *Long*(*b*), and *Peppin* v. *Cooper*(*c*). [Lord *Abinger*.—Certainly, something must appear on the face of the bond, to show that it extends to a continuance, but does not that sufficiently appear in the condition of this bond. *Parke*, B.—The cases do not approach this; it would be very difficult to put stronger words into a bond. Your construction must reject the words "every subsequent year."]

Hayes, contrà, was stopped by the Court.

Lord ABINGER, C. B.—The words "said office," are merely descriptive of the office. It would be very difficult to find any form of words more explicit to make a continuing obligation. This form was probably adopted to save the expense of entering into fresh bonds every year.

PARKE, B.—I have not the slightest doubt that this bond applies to every year, during which he shall continue to be appointed. Whether it would apply, if he were re-appointed after a chasm is another question, which it is not now necessary to consider.

BOLLAND, B., and ALDERSON, B., concurred.

Judgment for the plaintiff.

(*a*) 6 East, 507.
(*b*) 2 M. & S. 363.
(*c*) 2 B. & Ald. 431.

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A building agreement stipulated that the builder for every week beyond the time stipulated for the performance of the work, should forfeit the sum of 5*l.* weekly, such penalty or forfeiture to be deducted from the amount which might remain owing on the completion of the work.—*Held*, that the other party was not bound to deduct the forfeiture, but that he might maintain an action for it, or make it a subject of general set-off against the builder.

ASSUMPSIT for goods sold and delivered, and work and labour. The third plea was as to 55*l.* parcel, &c., that by certain articles of agreement, between the plaintiff of the one part and the defendant and *Archibald Mansfield* of the other part, it was recited, that the defendant was the owner of a warehouse and premises at *Liverpool*, and that he had contracted and agreed with the plaintiff for the altering and repairing of the said warehouse for the sum of 815*l.* 19*s.* in the manner and upon the terms in the said articles, after expressed and referred to, upon the express condition, that the plaintiff should find and procure good and sufficient surety for the due and faithful performance of the said contract, and that the said *A. Mansfield* had agreed to join in and execute the said articles as a surety of the plaintiff, in the manner hereinafter expressed, and in and by the said articles, the plaintiff and the said *A. Mansfield* did for themselves jointly, as well as severally, and for their joint and several heirs, executors, and administrators, the plaintiff should and would on the day of the date of the said articles, proceed to alter, repair, and build the aforesaid warehouse, conformable to a certain plan to the said articles annexed, and under the direction of *John Broadbent*, of *Liverpool*, architect and surveyor, in every branch and department of business, as might be requisite for carrying on and completing the work, according to the stipulations in the said articles in that behalf mentioned, in a substantial and workmanlike manner, in three months from the date of the said articles, and in the event of the said work not being fully and effectually completed in the aforesaid period, to the satisfaction and approval of the said *J. Broadbent*, he the plaintiff should forfeit and pay to the defendant the sum of 5*l.* weekly, and every week he should be engaged in such work beyond the said period of three months, such penalty or forfeiture to be deducted from the amount, which might remain owing from the defendant to the plaintiff, on the satisfactory completion of the aforesaid work, in consideration whereof, and of the aforesaid covenants, conditions, and agreements being fully complied with, the defendant, did, by the said articles, covenant, promise, and agree to and with the plaintiff, his executors, and administrators, in manner following, that is to say, that he the defendant should and would pay, or cause to be paid, at the times and in manner in the said articles aftermentioned unto the plaintiff, the several sums therein specified, making together the total sum of 815*l.* 19*s.* as by the said articles reference being thereunto had would appear. And the defendant alleged, that though the plaintiff duly proceeded to alter, repair, and build the said warehouse, under the directions of the said *J. Broadbent*, in pursuance of the said articles, yet the plaintiff did not execute and perform all and singular the covenants and stipulations in the said articles in that behalf mentioned, in a substantial and workmanlike manner, in three months from the date of the said articles, but the defendant said that, on the contrary thereof, the said work was not fully and effectually completed in the aforesaid period, to the satisfaction of the said *J. Broadbent*, nor until the lapse of, to wit, eleven whole weeks after the end of and beyond the said period, during the whole of which the said work was incomplete, and the plaintiff was during each of the said eleven weeks beyond the said period engaged in the said work, whereby and by force of the said articles

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the plaintiff became liable to pay to the defendant the sum of 55*l.* being after the rate of 5*l.* weekly, and for each of the said eleven weeks beyond the period, during which the plaintiff was so engaged in the said work as aforesaid. And the defendant saith, that he did before the commencement of this suit, at the times and in manner in the said articles mentioned and provided for, pay to the plaintiff the said total tum of 815*l.* 19*s.* for and in respect of the said work in the said articles mentioned, without deducting or retaining therefrom the said sum of 55*l.* or any part thereof. And the defendant saith, that the said sum of 55*l.* and every part thereof was, at the commencement of the suit, and still is, due from the plaintiff to the defendant, by virtue of the said articles, and which said sum equals and exceeds the damages sustained by the plaintiff, by reason of the non-performance by the defendant, of the said several promises in the declaration mentioned, so far as the same relate to the said sum of 55*l.* parcel, &c.; and the plea concluded by offering to set off this sum.

The *replication* traversed the payment of the sum of 815*l.* 19*s.* and the set-off.

At the trial before *Parke*, B., at the last assizes for *Liverpool*, the defendant obtained a verdict.

Alexander, now moved for judgment *non obstante veredicto*. The plea confesses that 55*l.* are due, and attempts to avoid the debt by that which in law is not matter of set-off. A specific mode of satisfying that debt is pointed out in the articles, which make the penalty payable only by a deduction from the sum due to the plaintiff; that, in fact, is the condition upon which any debt arises.

PARKE, B.—We all think the right to deduct the penalty is an additional power given to the defendant. There is a substantial covenant to pay the sum forfeited, the defendant may deduct it if he chooses, but he is not bound to do so; there is nothing to preclude him from suing for the amount.

Rule refused.

WELLS *v.* ODY.

The Building Act, 14 G. 3, c. 78, s. 43, does not protect a party from action for a collateral damage, as in darkening lights resulting from a party-wall, erected with a *bonâ fide* intent to pursue the provisions of that act; and, therefore, in an action for such an injury, no notice of action is necessary, nor is it necessary to bring it within three months from the time of the building of the wall.

Case lies for darkening the plaintiff's windows by a wall erected by the defendant partly on his own land, and partly on the plaintiff's land.

CASE. The declaration stated that the plaintiff was possessed of a certain messuage or dwelling-house, situate, &c., and carried on therein the trade of a coffin-maker, in which messuage were divers ancient windows, through which the light ought to enter; and that the defendant, intending, &c., heretofore, to wit, on, &c., and on divers other days and times, &c., wrongfully erected and built a certain building, to wit, a workshop, near to the windows of the said plaintiff in his said messuage, and kept and continued the said erection and building, so as aforesaid built, for a long space of time, &c. And also, to wit, on, &c., kept and continued a certain other building near to the windows of said plaintiff in his said messuage. By means whereof the plaintiff

was prevented from using his messuage as he otherwise would have done, &c. *Plea*, Not guilty.

At the trial, before *Parke*, B., at the *Middlesex* sittings after *Hilary* Term, it was in evidence that the houses of the plaintiff and defendant were contiguous, and that the defendant had erected a party-wall, which stood partly upon the plaintiff's, and partly on the defendant's, land. A further elevation, by the defendant, of the party-wall, to form the side of a workshop, had the effect of darkening the plaintiff's ancient windows. One question left by the learned judge to the jury was, whether, supposing the wall to consist only of that part which stood on the plaintiff's land, it would have the same effect as the wall which was actually erected: the jury found that it would. Two objections were taken on the part of the defendant:—1st. That the action was out of time, the party-wall having been *bond fide* erected in pursuance of the provisions of the Building Act, 14 G. 3, c. 78, which limits the time of bringing actions for any thing done in pursuance of that act to three months from the act complained of: and, 2dly, that the form of action was misconceived; that it ought to have been trespass (*a*); the part of the wall which was nearest to the plaintiff's windows, and, therefore, the proximate cause of the injury, being erected, on the plaintiff's own land, and, consequently, a direct injury to the plaintiff's property. A verdict was taken for the plaintiff, with liberty to the defendant to move to enter a nonsuit. *Kelly* obtained a rule accordingly.

Bompas, Serjt., *Humfrey*, and *Barstow*, shewed cause.—The 43rd section of the Building Act, 14 G. 3, c. 78, does not take away the plaintiff's right of action for the collateral injury which the plaintiff has sustained by the elevation of the party-wall. It is by that clause enacted, "that any party fence-wall now built, or hereafter to be built, may be raised by and at the expense of the proprietor or occupier of the ground on either side adjoining thereto; but no party fence-wall shall hereafter be built upon or against, or made as a party-wall, unless the same be of the materials, height, and thickness hereinbefore directed for party-walls to the rate or class of building so to be erected against or upon the same. And in case of the insufficiency of such wall for the purposes aforesaid, or if, instead of such party fence-wall there be only a wooden fence, the proprietor or occupier of either of the adjoining premises shall be at liberty, at his own expense, to take down such wall or fence, and erect a new party-wall in lieu thereof, making good every damage that may accrue to the adjoining premises by such rebuilding, so, nevertheless, as that such new party-wall shall not extend on the surface of such adjoining ground more than seven inches beyond the centre line of such party-wall or fence; but no proprietor or occupier of such adjoining premises shall make use of such party-wall, otherwise than as a party fence-wall, unless he, she, or they, pay a proportionate share of the whole expense of making such parts of such wall, according to the use he, she, or they shall make of the same, at the rate aforesaid." The evident intention of this clause was to give certain powers to a party who was already entitled to erect a party-wall dividing the contiguous houses, but not to give a right to erect any wall, causing, by its collateral

(*a*) An action of trespass had been previously brought for the erection of the party-wall; but the plaintiff was nonsuited, it appearing, that the wall was erected with a *bonâ fide* intention to pursue the provisions of the Building Act, and no notice of action having been given. The present action was brought to recover damages for the consequential injury to the plaintiff's lights resulting from the same erection.

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consequences, an injury to his neighbour's rights. A mode of appointing surveyors is directed by the act, who are to ascertain whether buildings are erected pursuant to it; if not, they are to be declared a nuisance; but the surveyor has no power to inquire into the question whether a party has sustained a collateral injury by a party-wall; he has nothing to do with the question of the right to build a party-wall, or to fix the height of it. [*Parke*, B.—Your argument is, that, as far as the direct injury to the plaintiff's premises is in question, he can have no remedy, except one controlled by the Building Act, which requires notice of action, and limits the time for bringing it; but that the Building Act does not authorize a man to darken his neighbour's lights; and, therefore, an action on the case may be maintained.] *Titterton* v. *Conyers* (*b*) is an authority in point. It was there held, that the Building Act did not protect a party so building a party-wall as to darken his neighbour's ancient lights.

The second objection is to the form of action,—that it ought to be in trespass, because part of the injury is a direct trespass on the plaintiff's land. This objection is open to several answers. Supposing the act to be originally trespass, case will lie for the consequences resulting from a continuance of it. Though trespass might lie, the plaintiff was at liberty to waive it, and bring case for the consequential injury. *Branscomb* v. *Bridges* (*c*), *Smith* v. *Goodwin* (*d*).

Kelly, *Adolphus*, and *R. V. Richards*, *contrd.*—An action on the case is not maintainable: the proper form of action is trespass. The injury resulted from a wall erected partly on the defendant's, partly on the plaintiff's, land; but the proximate cause, which is alone regarded in law, arose from that portion of it which was nearest to the plaintiff's windows, and which stood on his land, and was, therefore, a direct act of trespass. If it is to be contended, that the plaintiff complains of an abuse of what may be termed the parliamentary privilege of building a wall, the declaration should have been framed to meet such a case, which would be a kind of transformation of an action of trespass into a special action on the case. If the portion of the wall which stood on the defendant's land had been the only cause of the injury, case would have been the proper form of action; but, in the present instance, no damage resulted from that part; if it had been taken down, the deprivation of light would have been quite as great; and it is no answer to this argument to say, that the defendant's part would have produced an actionable injury if the plaintiff's part had been removed; because it is in respect of the effect produced by the wall that it amounts to a wrong to the plaintiff; but if no effect proceeds from it, there is no injury in law. The whole damage resulted from the part which was on the plaintiff's land, and for that trespass only is the remedy. [*Parke*, B.—In *Com. Dig.*, *Action on the Case for a Nuisance*, A., a case is put of a direct injury, for which, it was held, case would lie. "So an action upon the case lies for a nuisance to the habitation or estate of another; as if a man build a house hanging over the house of another, whereby the rain falls upon it."]

The Building Act furnishes a complete answer to the action; for, though

(*b*) 5 Taunt. 465.
(*c*) 1 B. & C. 145
(*d*) 4 B. & Ad. 419.

the act complained of, the erection of the party-wall, may not be completely justified, still, if it was done *bonâ fide* with an intention of pursuing the provisions of the act, the action must be brought, subject to the limitations of the act as to giving notice, and bringing it within three months.

Lord ABINGER, C. B.—The finding of the jury raises the chief doubt in this case. It is an action on the case, brought for a nuisance by stopping up the lights of the plaintiff, in consequence of a wall erected by the defendant. The answer given to the action is, that the wall was erected partly on the property of the defendant, and partly on that of the plaintiff; and the jury have found the obstruction would have been as great from that part of the wall which is on the soil of the plaintiff. It is said the action should have been trespass: that is the first question. In support of this objection no case has been cited to shew, that, where an injury has been done, of a consequential nature, to the comforts and convenience of the plaintiff, effected partly by an act of trespass, and partly by an act that was not a trespass, but from either of which the injury must and would have resulted, that the plaintiff is bound to bring the one form of action rather than the other. I can see no argument, in principle, which should preclude the plantiff from bringing an action on the case. If the argument be good that he cannot bring an action of case, because part of the injury is resolvable into trespass; by a parity of reasoning, he could not bring an action of trespass when it is resolvable into case; so that, if the argument is good for any thing, it proves the plaintiff to be without any remedy at all. I should think the plaintiff might have brought an action either one way or the other. Suppose a person's premises are injured by the changing of a watercourse by the erection of a weir partly on the land of the plaintiff and partly on the land of the defendant; the erection of that which is on the plaintiff's land would be the subject of an action of trespass, and doing the same thing on the defendant's land would be the subject of an action on the case. If both acts are done at the same time, and form part of one *res gestæ*, and the consequential injury is in respect of both together, it appears to me the plaintiff may bring his action of trespass, or his action on the case; if not, for the reasons I have before stated, it appears to me he can bring no action at all. There are not wanting sufficient analogies to shew that where an injury is done to a right of way,—in fact, where there is a common injury, there may be a common remedy, and there a party may adopt either. In the case of a nuisance, where the act is committed in one county, but the effect is produced in another, it gives a right of action in either county. In an indictment for a nuisance which has its origin in one county, and produces an immediate effect in another, the venue may be laid in either. That will be found laid down in the old books. However specious the objection is, it will not bear investigation, and the result is, in this case, that the party might have brought either the one action or the other.

It has been argued that the plaintiff could not have sustained any injury except from that part of the wall built on the plaintiff's land, but the jury never meant to say that. I do not understand their verdict to mean to say that could not be consistent with common sense unless that part which was on the defendant's soil was mere light and air. What the jury meant in common sense was that if the wall had been built on the plaintiff's moiety alone the injury would have been the same in effect. I think that disposes of the first objection.

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The next objection is that the injury complained of is justified by the Building Act, not in terms, but that the defendant is protected by want of due notice of action and its not being brought in due time. It appears to me that neither of these objections can be maintained. The Building Act was intended to prevent any action of trespass or of case being brought against parties for doing the precise things which are authorized by that act to be done, but I apprehend the protection given by the Building Act was not intended to apply to cases never contemplated by the act at all, but to the injuries immediately resulting from the acts of the parties acting under it; therefore if the complaint is trespass for erecting on a party wall, the Building Act is a sufficient answer to the trespass, and though it be for an injury done which may not be the subject of protection under the Building Act, notice of action still is necessary. If it be a case of a partial justification of the acts which the act authorizes to be done, then in what manner would a party who complained of an injury which he thought was not justified by the act, proceed? He would bring an action of trespass. If the defendant justifies under the Building Act the plaintiff would reply to shew that he had done something that the Building Act did not justify, and therefore he had become a trespasser *ab initio;* and if the act done was not such an one as could be protected by it, he could not plead the Building Act in justification of it. The Building Act gives a party the right to do on his neighbour's land, exactly the same as he might legally have done with his own, and if any collateral injury results, it is not to be the subject of an action of trespass, for the Building Act justifies the trespass, and makes him stand in the same situation as though the wall were his own. It appears to me this is not the sort of injury which the Building Act protected. Suppose a party raises a party fence-wall, and puts a chimney in the fence-wall, and after three months have elapsed, the time for bringing the action, he lights a fire and the chimney becomes a nuisance to his neighbour, is that neighbour prevented from bringing his action merely because the three months have elapsed? There was no cause of action until the fire was kindled and the smoke created. There may be a certain class of nuisances which are consequential, which originate from acts done under the Building Act wherein a party cannot bring an action. No doubt that may be the case. All that is the necessary and immediate consequence of the act done may be justified under this act. It appears to me that the present plaintiff might bring his action on the case as well as trespass. On these grounds I am of opinion the rule should be discharged.

PARKE, B.—I entirely concur with the Lord Chief Baron. The first question is whether this is a case within the Building Act at all, whether it be such an act as is justified under the Building Act, and therefore that the defendant would be entitled to a verdict under the plea of the general issue, or whether the plaintiff should not have brought his action within three months from the time of the act being done and have given notice of his intention to bring an action. It appears to me to be quite clear that this case is not within the Building Act at all. The object of the Building Act was to preserve houses in this great city from fire, and to secure the making of a proper division between each house so that there might be less danger from fire. Read the 43rd section of the act. The object of that is to enable any proprie-

tor without a fence-wall between his own house and the house of his neighbour to make a more complete party-wall, and as he could not do it without some legislative power, they gave the owner of the land power to use the adjoining moiety as his own, but subject to a provision as to the materials to be used. There the act stops and leaves the party to all the consequences of the act, and no reference is made to any injury the wall may sustain, or the eventual damage caused by its being a nuisance. That appears to have been wholly out of the contemplation of the legislature; and that being so, it appears to me this case is not within the act at all; and if it should turn out to have been unnecessary, the Building Act has nothing to do with it; or if the wall is erected so high as to interfere with the light, it has nothing to do with that. It is not necessary, therefore, to consider at what period of time the cause of action is said to have accrued, or whether the notice is sufficient.

The next question is, that being so, whether an action on the case is maintainable. It appears to me an action on the case is maintainable. It is contended it is not, on two grounds;—one is that put by the Lord Chief Baron, that this is a joint act, an act incapable of severance. This is a wall built partly on the property of the plaintiff, and partly on that of the defendant. The wall is an entire wall and not separate. Then it appears to me it is a case in which the plaintiff has the option as to the form of action he may choose to adopt; and the more natural and proper remedy is by an action on the case. Besides, the case put by the Lord Chief Baron where, from the necessary principles of common law, the action might be brought in the county where the cause of action arose, or, from the necessity of the case, the plaintiff has the option of bringing his action, either in that county, or in that in which the injury is sustained, there are some other cases in which the plaintiff has an election of the form of action. In the instance of an action brought for an injury done by a stage-coach, which was driven by the defendant himself, whose immediate carelessness caused the damage, it is held that an action of case will lie. *Moreton* v. *Hardern* (*a*), and *Williams* v. *Holland* (*b*). There is another case which bears very strongly on this; it is a very old case, which is cited in *Comyn*'s Digest. Action upon the case for a nuisance A —"Where a man built a house hanging over the wall of another so that the rain fell upon it, it was held, that an action on the case was maintainable." It may be an act of trespass, but in the old authorities it is held, an action on the case would lie for the consequential damages sustained by it. In this case, though the building on the joint wall was in part a trespass, yet as the effect of the act altogether was the cause of consequential injury, the plaintiff may bring an action on the case. So no doubt he might in the case put by the Lord Chief Baron of the weir partly constructed on the soil of the plaintiff and partly on that of the defendant; as the effect of the whole weir is to drive the water from the plaintiff's mill, the plaintiff might maintain an action on the case for the nuisance. It would seem to me an action on the case is the more appropriate mode, though probably an action of trespass might also lie. I am also disposed to think that, assuming there were an injury committed by the moiety erected on the plaintiff's land only; and none by that portion erected on the defendant's land, an action on the case could

(*a*) 4 B. & C. 223. (*b*) 10 Bing. 112.

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also be maintained for that; for if I am right in supposing the object of the Building Act is to give him a right of using the wall as his own, an action on the case for so using his own property to the injury of his neighbour would lie. Looking at all the circumstances, it appears to me that an action on the case is the proper remedy, and I think this case is not within the spirit of the act at all, and that the plaintiff is entitled to recover.

BOLLAND, B.—I am of the same opinion, and after the full view that has been taken of this question by the rest of the Court I shall confine myself to one point only, namely, whether or not this be or be not within the Building Act. The clause which is here the subject of interpretation is the 43rd. I think that clause was introduced by the legislature with the sole view of regulating the construction and enjoyment of premises of this description. The section is divided into two branches; the first branch is applied to the manner in which the wall, (provided either party choose to raise it,) shall be made, taking the clause altogether it appears, if a person has between his own land and part of his neighbour's, a party fence-wall, he has a right to build on that side of the wall which is on his land and a right also to raise the wall on the side of his neighbour's, but in doing so he must be regulated by the other directions of the act of parliament, which say it must be of such and such material and such a thickness as may be applicable to a particular rate of building, and he must not encroach further on the land of his neighbour than a certain space, The act then goes on to say how the enjoyment shall be regulated. It appears to me the directions of this clause of the act are merely confined to regulate the construction of the wall, and the enjoyment of it; it says not one word about any injury done to the building in any other way. It leaves the question wholly open, as to whether or not the wall is erected at such a height as to prevent the light or the air from coming near the windows, and so to affect them in such a way as the neighbour has a right to their use. On these grounds, therefore, it appears to me this case is not within the Building Act. I think the rule must be discharged.

Rule discharged.

PIGGOTT *v.* BIRTLES and another.

An action will lie for an excessive distress in taking growing crops.

An action for distraining beasts of the plough is not maintainable, if the only other subject of distress is growing crops.

CASE. The first count of the declaration was for distraining cattle, goods, chattels, and growing crops, for more rent than was due; the second count, for taking and distraining beasts of the plough, there being other cattle, goods, and chattels, on the premises, sufficient to satisfy the sum distrained for; the sixth count was to recover the double value of goods taken under a distress, no rent being due; the seventh count stated, that on, &c. the defendants distrained the goods and chattels of the plaintiff, and also his growing crops of wheat, which would have been more than sufficient to satisfy the rent due, and the costs of the distress; that they sold the goods and chattels, but retained possession of the growing crops, on which the distress still continued, which when ripe would have been more than sufficient, yet that the said, nevertheless, afterwards, on &c., wrongfully and vexatiously made a second distress upon the goods and chattels of the plaintiff for the same arrear of rent.

To the first and second and sixth counts, the defendants pleaded not guilty; to the second, also, that there was no sufficient distress without taking the beasts of the plough. To the seventh count, a payment of 160*l.* into court, and on the sufficiency of that sum to cover the damages issue was joined. At the trial before Williams, J. at the summer assizes for the county of Salop, it appeared that the plaintiff, on the 25th March, 1835, was indebted to the defendant in the sum of 142*l.* 10*s.* for half a year's rent of a farm; on the 27th, the defendant distrained for that sum the plaintiff's cattle, his beasts of the plough, certain moveable chattels, and the crops growing on the demised farm. The cattle, beasts of the plough, and the other moveables, were sold by auction for a sum insufficient to satisfy the distress. On the 2nd April, the defendants still retained the growing crops, under a second distress, which, when sold, were still insufficient to satisfy the rent.

The learned judge, reserving leave to the defendant to move to enter a verdict on the ground that growing crops were not of that nature to be capable of valuation, left the questions to the jury:—Whether growing crops were of an appraisable or ascertainable value; and, if so, whether the quantity taken with the other chattels made the first and second, or either distress, unreasonable: whether, besides the beasts of the plough, there was a sufficient distress on the premises, including the growing crops. The jury found, that growing crops were of an ascertainable value; that an unreasonable quantity had been taken; that, therefore, both distresses were excessive; that, including the crops, there were sufficient subjects of distress on the premises, without taking the beasts of the plough; and they found a verdict for the plaintiff, with 100*l.* damages.

Ludlow, Serjt., in *Michaelmas* Term, obtained a rule to shew cause, why a verdict on the first, second, and sixth counts, should not be entered for the defendant, on the ground, that growing crops ought not to enter into the computation of the articles taken under the distress.

Talfourd, Serjt., and *Whateley*, in *Hilary* Term, shewed cause.—The proposition to be contended for on the other side is, that growing crops are in the estimation of law, of no value whatever. If the growing crops are of a legally ascertainable value, and the jury have rightly found it, both distresses were excessive, and the sixth count would be sustainable, on the ground that at the time of the second distress no rent was due, the arrear having been satisfied by the first distress. If, however, it were conceded that the verdict on that count cannot be sustained, still the plaintiff is entitled to keep the verdict on the first and second counts. The argument on the other side, that growing crops are of no ascertainable value, because of the changes, and even total loss, of value they are susceptible of, by the weather and other accidents, is altogether one for the jury. Every subject of distress is liable to depreciation or destruction, and a greater liability would proportionably affect the present value, but not make a thing totally valueless. Growing crops are ordinarily the subject of sale; they are seizable under a *fi. fa.* The fallacy of the opposite argument confounds appraisement with sale; undoubtedly they cannot be appraised until ripe (*a*), and before the stat. 2 W. & M. s. 1, c. 5,

(*a*) 11 G. 2, c. 19, viii.

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before there could be any appraisement or sale, an action might be sustained upon the equity of the statute of *Marlebridge*. Some estimate must be put on them to enable a sheriff to take the double value, as he is bound to do, upon a replevin (*b*). Indeed, the statute authorizing a levy upon growing crops, in itself recognizes them as of some value. The plaintiff has sustained great injury in having his dominion over his own property (*c*) taken away for so great a length of time,—in the increased difficulty, also, of finding sureties for a replevin,—and in the additional costs and charges, to which he is liable, of keeping possession of an unnecessarily large extent of land. [*Parke*, B.—And if the landlord was bound to take into account the probable value of the crops, he ought not to have taken so many chattels.] The defendant, indeed, is not in a position to raise the objection he has taken issue upon, the reasonableness of the amount of the distress, including the crops, and he cannot now say they are valueless; he ought to have demurred to the declaration.

The objection taken to the count for taking the beasts of the plough, shews to what a length the defendant is obliged to push his argument; not only may all the chattels on the farm be taken with the crops, but the implements of husbandry also, and so a man's trade would be completely destroyed.

Ludlow, Serjt., and *Busby*, *contrà*.—In legal estimation, these crops were not of one scintilla of value; they would be, if carefully tended and they escape the accidents of the elements, of value when ripe. Hops, turnips, and many other products of the earth, are frequently destroyed before the period when they ought to be mature; a hail-storm might destroy the whole hopes of a harvest: by what rule, then, can the quantity which the landlord ought to seize be measured? To give the plaintiff a right to maintain his first two counts, the act complained of must be not only wrongful, but damage must result from it. In this case the tenant sustained no damage. The stat. 11 G. II. c. 19, requiring the sheriff to take replevin bonds in double the value of the things seized, relates only to goods and chattels distrainable at common law, to which the statute giving a distress on growing crops does not assimilate them. *Miller* v. *Green* (*d*). The landlord could not sell them until they were ripe, and no necessity existed for replevying it. *Owen* v. *Legh* (*e*). The tenant may at any time relieve himself by tender, and the magnitude of the distress could not affect the amount to be tendered. [*Alderson*, B.—You would say, if he sells more when ripe than necessary, the tenant would have his remedy. *Parke*, B.—Your argument contends that putting in the distress is only creating a lien in the landlord, and not a distress until the sale.] Nor even if growing crops be capable of valuation, does it follow that this action can be maintained?—for they are unsusceptible of that division which is necessary to enable the distrainer so exactly to proportion the distress to the rent due. The case resembles that of the distress of an entire thing, as a horse, or a fold of sheep, to take which would not constitute an excessive distress. *Clarke* v.

(*b*) 11 G. 2, c. 19, xxiii.

(*c*) Lord Coke, on the stat of Marlebridge, 2nd Ins 107:—"It is worthy of observation, how provident the makers of these and other statutes be, men's beasts, cattle, or other goods, be not unjustly or excessively distrained; and if they be, that deliverance be speedily made of them by replevy; otherwise, the husbandry of the realm, and men's other trades, might be overthrown or hindered; and this agreeth with the reason of the common law."

(*d*) 2 Cr. & J. 143, S. C. 8 Bingh. 92.

(*e*) 3 B. & Ald. 470.

Tucker (*f*). Nor has the defendant, as has been argued, precluded himself from raising the question at *Nisi Prius*, by not having demurred to the declaration; by taking issue on the sufficiency of the chattels and crops to satisfy the distress; the defendant admits only that crops have been taken, and not that they are of any value.

Cur. adv. vult.

PARKE, B. delivered the judgment of the Court. Two questions remained for consideration in this case, which were discussed on shewing cause against a rule to enter a verdict for the defendant, on the first, second, and sixth counts of the declaration, upon a point reserved by my brother *Williams*: *first*, whether a landlord be liable, in point of law, to an action on the case for an excessive distress, where the excess consists wholly in taking growing crops, the probable produce of which is capable of being estimated at the time of seizure; and, *secondly*, whether he be liable to a similar action for seizing beasts of the plough as a distress for rent, there having been at the time a sufficient distress on the land demised, if growing crops are to be included for this purpose. The other points in the cause were disposed of, either on the trial or on the argument; these were reserved on account of their novelty and importance. The two questions differ from each other, and the Court have had much more difficulty in disposing of the first than the second, and we have entertained considerable doubts upon the subject; but in the result we are of opinion, that an action will lie for the excessive distress to recover *some* damages; but that an action is not maintainable for distraining beasts of the plough, under the circumstances of this case. The common law right of a landlord, to distrain for rent service, appears to be restricted at common law to the taking of a reasonable distress. So Lord *Coke* intimates, in his reading in the 2 Inst. 107, on the statute of *Marlebridge*, c. 4, which statute, he there says, "agreeth with the reason of the common law." But whether the duty be to make a reasonable distress by the common law, or by the statute, an action will equally lie, if there be breach of that duty, and damage thereby arise to the person on whose goods the distress is made. At common law, and when the statute of *Marlebridge* passed, a distress could be made only upon moveable chattels, being upon the land demised, and such as were capable, after they had been detained an unlimited time as a pledge, of being restored in the same plight and condition to the distrainee; and the damage which was sustained by the latter, by an excessive distress, was the loss of the use and enjoyment of the surplus of such goods, which were removed and impounded off the land, for such time as he was deprived of it; and if not restored before action brought, then probably he might claim the full value of such surplus. Where the common law right of the landlord was extended to other chattels of the like description, that is, capable of being removed and impounded off the premises, cattle or stock, for instance, upon commons appendant or appurtenant to the demised lands, the inconvenience to the distrainee being precisely of the same nature, doubtless he would be entitled to the same remedy. But the statute law has created some new distrainable subjects, which are not to be treated in the same way as those which are distrainable at common law; one class of which, though of a moveable nature,

(*f*) 2 Ventris, 183.

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is not allowed to be removed at all; and another is of an immoveable quality at the time of the distress, and both of which are to be disposed of in a way entirely different from that prescribed by the common law. One of those subjects is corn loose, or in the straw, or in sheaves, or cocks, or hay, which by the statute 2 W. & M. sess. 1, c. 5, s. 3, may be secured, locked up, and detained in the place where found, in the nature of a distress, until replevied; and in default of replevying, must, it should seem, be sold in five days, and cannot be removed: and this species of subject of distress differs from that at common law, in respect of its being legally both incapable of removal, and of being kept for an indefinite period, till payment of the rent. Another of these subjects is growing corn or other product, which, by 11 G. 2, c. 19, may be distrained, but cannot be disposed of until after it has become ripe, and been cut, which must be afterwards placed in barns or other proper places on the demised premises, and cannot then be removed from the premises, except *sub modo*, that is, in default of there being such a proper place; and this new subject must, as it seems, be then sold; so that it differs entirely from the common law subjects of distress.

The question then arises, whether both or either of these new distrainable subjects be within the principle of the common law, or the statute of *Marlebridge;* so that the distrainer is to be liable if he takes an unreasonable quantity of such subjects, either alone or jointly with other abuttals; and we think that they are. The duty of taking a reasonable quantity which the law casts on the distrainer, cannot be varied by this extension of his powers; if he takes more, he exceeds his duty; and if damage is caused thereby to the distrainee, it seems to be inconsistent to say, that he shall not have a remedy, because, from the change in the mode of treating the subject of distress, the nature of the damage is changed. If there be a breach of duty and damage thereby, the case falls within the established principle, though the quantum of compensation will of course vary if the damage be less. Does the distrainee, then, sustain damage by the act of the distrainer, in taking too large a quantity either of corn, or hay loose, or growing crops? It seems to us that he does in both cases. In the former, he is deprived of the power, for a limited time, of making use of the corn or hay for his cattle, or disposing of it fairly at the market; or he is exposed to the inconvenience of procuring sureties in a replevin bond to a larger amount, if he chooses to replevy, and to regain the full dominion over his property: and it may be, that an additional expense for securing the distress is cast upon him by this unnecessary addition to the chattels distrained, for he must ultimately pay whatever reasonable expense is incurred by the landlord. In the latter case, that of a distress of growing crops, he is deprived of the power of selling, and receiving the money to his own use, with respect to all the surplus which the landlord has unreasonably taken. He cannot feed off or cut his crops, whilst green, for fodder or sale: he may, also, be exposed to additional expense in keeping the distress; for the statute 11 G. 2, c. 19, s. 19, provides, that if the tenant pay to the landlord, before the crops are ripe, cut, and gathered, all the rent and costs and charges of making the distress, and which shall have been occasioned thereby, the distress shall cease. It is therefore clear, that the law contemplates, that in a distress of a growing crop, some other expense will be occasioned to the landlord than that of making the distress. Such would be the case if the tender was made at a late period of preparing for or beginning

harvest, which might be greater to the landlord than to the tenant; and the cost of looking after the crops, to prevent their being damaged by trespassers, or improperly abstracted by the tenant, which would be incurred from the earliest time. These expenses the tenant would ultimately have to pay, and he could not be relieved from the accruing liability to pay them, or restored to the full dominion over his growing crops, without the inconvenience of replevying, and being bound, if he replevies, to give security to double the full value, being a greater amount than he would have done if a proper distress had been taken. These are inconveniences to a tenant from taking too large a distress, though they vary much in degree, and in most cases would be almost nominal; but if there be any damage, the action, we think, will lie. One mode of illustrating the principle is, by putting an extreme case as suggested at the bar. Suppose, for an arrear of *5l.*, the growing crops on a thousand acres of land were distrained in *March*, and the tenant thereby prevented from dealing with the crops, by selling them on his own account, or cutting them, or feeding them off by cattle, if he choose, from thence to the following harvest time, it could not be said that the quantity taken was not greater than it ought to have been, or that the tenant had sustained no damage. The principle is the same as the present, and the inconvenience differs only in degree.

For these reasons, we think that the plaintiff was entitled to a verdict on the first count, but not for the full value of the crops beyond the amount which ought to have been taken, upon which principle the jury appear to have given their verdict. The true measure of damage is simply a compensation for the additional expense of distress, and of keeping possession of that part of the crops which it was unnecessary to take during the time of possession, and some compensation for the loss of the absolute ownership and power of disposition for the same time; or if the tenant has replevied, then a compensation for the additional expense and inconvenience of replevying to a larger amount. It cannot be contended that the probable value of the crops is to be taken as a present satisfaction of the rent to that amount, so as to make the landlord a wrong-doer by taking and selling all, or, as the case may be, the excess of moveable chattels, and liable for their value; for he has a right to apply those which are immediately productive in satisfaction of the rent *pro tanto*, and hold a reasonable part of the present unproductive fund as a security for the balance. We therefore think that the jury have given excessive damages, and, unless by mutual agreement they can be reduced to a sum nearly nominal, there ought to be a new trial.

The second question is, whether the landlord can be liable to an action on the case for taking and selling beasts of the plough, when there was another sufficient distress on the land demised? but such sufficient distress included growing crops, and without those crops there was no sufficient distress. We are clearly of opinion that he is not liable in this case, for the landlord has a right to resort to the subjects of distress which are immediately available, to raise the arrears of rent by sale, and is not bound to take those which cannot be productive till a future period. If there are other moveable chattels to the amount of the rent and expenses, besides *averia carucæ*, he would not be justifiable in taking the latter; but if there are not, he has a right to take and sell all or so many of the beasts of the plough as may be necessary, with the other moveable and saleable chattels, to satisfy the arrears and charges. We

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therefore think the verdict, on the second count, should be entered for the defendant; and it is conceded by the plaintiff, that on the sixth count the defendant is entitled to a verdict.

Rule accordingly.

JONES *v.* NANNEY, ESQ.

A plea to a count for work and labour that the debt, except as to the sums of, &c. was due on a special contract to work for the disbursments out of pocket, is bad on special demurrer, as amounting to the general issue.

DEMURRER.—Assumpsit to recover the sum of 2000*l.* for the work, labour, and attendance of the plaintiff, as the attorney and solicitor of the defendant, and for money paid, and on an account stated. Second plea, as to the breach of promise in the declaration mentioned, so far as the same related to the non-payment of the sum of 2000*l.* in the declaration firstly mentioned; except the sum of 90*l.*, parcel thereof, and of the sum of 150*l.* in the first plea mentioned, *actionem non*, because the defendant says, that the said work, labour, and attendance were given, done, and bestowed for and on behalf of the defendant, on two several occasions: the former of which occasions was in the year 1832, and the latter in the year 1834, and on each of which occasions, he, the defendant, became, and was a candidate for the representation in the Commons House of Parliament, of certain boroughs called and known by the name of the *Carnarvonshire* boroughs, and the said work and labour, &c. were given, done, and bestowed, in and about the endeavouring to secure, and in and about the promoting the return of the defendant as a representative of, and member for the said boroughs, and for no other purpose, and on no other occasions whatsover. And the defendant further saith, that the said work and labour, &c. of the plaintiff, so far as the same related and relates to the first of the said occasions were done, given, and bestowed by the plaintiff, under, and by virtue of a certain agreement heretofore and before the plaintiff had done, given, or bestowed the said work and labour, &c. or any part thereof, or had been or was retained by the dedefendant for that purpose; to wit, on the first of *September* 1832, made, entered into, and concluded in that behalf, by and between plaintiff and the defendant, which said agreement was and is to the effect following, viz.—That he the plaintiff should do, give, and bestow the work and labour, &c. of him the plaintiff in and about the endeavouring to secure, and in and about the promoting the return of the defendant as a representative, &c. on the first of the said occasions, without being or becoming entitled to have or demand from the defendant in respect thereof, any fees, money, or remuneration whatsoever; but that he the plaintiff should be entitled to have, receive, and demand from the defendant on such occasion, such sums and monies only as he should or might disburse, pay, lay out, or expend for or on behalf of the defendant in and about the endeavour to secure, and in and about the promoting the return of the defendant, &c. on the first of the said occasions. And the defendant further saith, that, but for the said agreement, he the defendant would not have retained or employed the plaintiff to do, perform, and give or bestow his said work and labour, in so far as related to the first of the said occasions, or any part thereof; and that there was not at any time any express contract or agreement made or subsisting by or between the plaintiff and the defendant, touching or relating to the scale, rate, or amount of the

fees, money or remuneration to be paid, received, or demanded of or from the defendant, and to be by him payable and paid to the plaintiff for or in respect of the said work and labour, &c. so far as the same related to the last of the said occasions. And the defendant further saith, that the said work and labour, &c. of the plaintiff in the declaration mentioned, were not wholly or in part done, given, or bestowed in or relating to any suit or suits or other proceedings whatsoever in any court of law or equity; and the defendant saith, that a fair, reasonable, and proper remuneration to the plaintiff, for or in respect of the said work and labour, &c. so far as the same related to the last of the said occasions; together with all fees due or payable in respect thereof, did not at any time and does not exceed the said sum of 90*l.* parcel, &c. Verification, special demurrer assigning for cause (amongst other things) that the said plea does not either sufficiently confess and avoid, or traverse and deny that part of the declaration to which it professes to be an answer; and that the defendant does not in or by that plea admit even a colorable right of action in the plaintiff; and that the matter of the said plea amounts only to the general plea of *non assumpsit*, and, therefore, tends to great and unnecessary prolixity of pleading, &c. &c.

Cowling, in support of the demurrer, was stopped by the Court.

J. Jervis, in support of the plea. The plea admits facts—the work done, from which in law there would be implication of a promise, and avoids the effect of such facts, by shewing the additional facts which negative the plaintiff's right of action. *Edmunds* v. *Harris*, (*a*) is an authority in support of the plea; it was there decided, that it was the subject of a special plea, that the credit had not expired. It must be admitted, that that case has been questioned.

Lord ABINGER, C. B.—We decided very recently that, under *non assumpsit*, evidence might be given that there was a special contract to make a machine, which was not to be paid for unless it worked properly.

PARKE, B.—I think you may consider *Edmunds* v. *Harris* as overruled. The matter stated in this plea would be evidence to shew that there was no such contract as that declared upon.

The other judges concurred.

Judgment for the plaintiff.

(*a*) 2 Ad. & El. 414.

Doe dem. NASH *v.* BIRCH.

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A demise was made by the the lessor of the plaintiff, and by the terms of the demise, the land was to be forfeited on a certain event. Subsequently to the occurrence of the event stipulated against, the son of the lessor of the plaintiff, who had acted as his agent, and by whose instructions an ejectment was brought for the forfeiture, demanded the rent; held that there was not sufficient evidence of the son's authority to waive the forfeiture.

EJECTMENT. At the trial before Lord *Abinger*, at the sittings in *Middlesex* after last *Michaelmas* Term, it appeared that the action was brought to recover possession of a house and appurtenances situated in *Crawford* Street, on a forfeiture. The lessor of the plaintiff held a long term in the premises in question, by a demise from Mr. *Portman*. A written agreement was made between *George Chowles*, the agent of the lessor of the plaintiff, dated the 1st of *June*, 1835, for a lease to him of the premises which were then a private house, for the purpose of being converted into a beer-shop and eating-house. By that agreement, in consideration of the sum of 60*l*. per annum, payable quarterly, the said *George Chowles* agreed to let to the said defendant the premises in question, on lease for seven, fourteen, or twenty-one years, determinable, &c. And the defendant agreed to take the premises, and pay the rent quarterly; and he further agreed that he would, at his own expense and within three calendar months, erect a shop-front, and otherwise repair, paint, paper, and white-wash the whole of the house, and so keep the same in good repair during the whole term, and at the end of either of the said terms, deliver it up in good tenantable repair. And the said *George Chowles*, for the said *J. Nash* (the lessor of the plaintiff,) did agree, that on the shop-front being erected, and the said house and premises being put into good and sufficient repair, the said *J. Nash* should execute the said lease, bearing date *Midsummer*, 1835, from which time the rent was to commence, at the expense of the defendant. And it was further agreed between the parties, that in case the defendant did not erect the shop-front, and otherwise repair the premises, within three calendar months from the date of the agreement, it should be lawful for the said *J. Nash*, or his agents, to re-take possession of the premises, and the agreement should be null and void. And the defendant further agreed that, in case he did not fulfil his engagements at the time specified, he would forfeit and bind himself to pay the sum of 20*l*. to the said *J. Nash*, over and above the rent that might be due for the premises at that time.

The defendant entered, and made a window, but as found by the jury, not a shop-front within the meaning of the agreement. Evidence was offered, on the part of the defendant, to shew that the lessor for the plaintiff held the premises under a lease from Mr. *Portman*, containing a clause for a penal rent in case a trade was carried on without a license from him, and that Mr. *Portman* had distrained for that rent which the defendant had paid. The defendant further contended that there had been a waiver of the forfeiture. The son of the lessor of the plaintiff proved that, during his father's illness, he had acted as his agent, had seen the alterations, and had made no objection; that on the 5th of *July*, 1835, he had sent a notice to the defendant referring to the covenant in the original lease, and requiring the defendant "not to use the said messuage or tenement, or premises, for the said trade of a victualler or as a public-house, or for a beer-shop, or coffee-shop, or for any other art, trade, or business whatsoever," and giving the defendant notice that he would be responsible for any damage the lessor of the plaintiff might sustain by a breach of the covenant. The witness further stated that, shortly

after *Michaelmas*, he had demanded from the defendant the rent due up to that time, but which he defendant refused to pay, unless he had an indemnity against *Mr. Portman's* demand. The witness further stated, that the ejectment had been brought by his directions, without any communication with his father, who from illness was unable to attend to business. Lord *Abinger* was of opinion that these facts did not amount to a waiver, and the plaintiff had a verdict.

Erle, moved for a new trial, on two grounds, 1st. that the evidence of the covenant in the original lease was admissible to shew that the parties to the agreement could not have used the word "shop-front," in its ordinary meaning; such a construction requiring the defendant to commit a breach of the covenant. 2nd. that there was a waiver of the forfeiture, who must be taken to be the agent of his father, otherwise, as the ejectment was brought by his authority alone, the defendant would be entitled to have a stay of proceedings. The Court granted a rule on the second point only.

Bompas, Serjt. shewed cause.—In this case the lease had become null and void, by the neglect of the defendant to erect the shop-front, and it was not competent to the lessor of the plaintiff, by himself or agent, to waive the act of forfeiture so as to keep the lease in force. It would be otherwise if there were merely a power to re-enter on the breach of a covenant. [*Parke*, B. It is difficult to maintain that argument, since the case of *Doe* dem. *Brian* v. *Bancks* (*a*).] Supposing, however, that the demise was voidable, the acts of the son, even supposing him to be his father's agent, do not amount to a waiver. [*Parke*, B.—In *Green's* case (*b*) rent was demanded at the day, but not paid, and two days after, the lessor received the rent of him, and "made him an acquittance by the name of his fermor," and the question was, whether this barred the right of re-entry. "And it was clearly resolved that the bare receipt after the day was no bar, for it was a duty due to him; but a distress for the rent, or a receipt of the rent due at another day, was a bar, for these acts do affirm the lessee to have lawful possession; so if he maketh him an acquittance with a recital that he is his tenant, and in this case, by calling him his fermor, it is a full declaration of his meaning to continue him his tenant, and it was adjudged that the entry was not lawful."] The demand in the present instance by the son was not acquiesced in; there was nothing to shew that the defendant was treated as a tenant after the forfeiture.

The son was not the agent of the father, with authority to do more than receive the rent, he had no authority to waive the waiver.

Barstow, contrà. There are two recent authorities, which are quite conclusive, that such a stipulation as in the present instance, does not on the occurrence of the event provided against, make the lease absolutely void, but voidable at the election of the lessor. *Doe* v. *Bancks* (*c*) *Arnsby* v. *Woodward* (*d*). Then the acts of the son are a clear recognition of the defendant as tenant.

(*a*) 4 B. & Ald. 401.
(*b*) Cro. Eliz. 3.
(*c*) 4 B. & Ald. 401.
(*d*) 6 B. & C. 519.

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Lord ABINGER, C. B.—The Court are disposed to acquiesce in the authorities cited, to shew the construction which ought to be put on the words "null and void" as here used. But I feel strongly that there was not sufficient proof of the son's authority to elect to treat the defendant as a continuing tenant.

PARKE, B.—The whole question turns on the son's authority. I think there is not sufficient evidence to shew that he had authority, equivalent to the authority to grant a new lease, to waive the forfeiture. The question of waiver therefore does not arise.

ALDERSON, B., and GURNEY, B., concurred.

Rule discharged.

GROUNDSELL *v.* LAMB.

In *indebitatus assumpsit* for goods sold and delivered, evidence is admissible under the plea of non-assumpsit, to shew that the article was a machine for which nothing was to be paid unless it worked well, and the defendant is entitled to a verdict, if he shews that the machine did not work well.

ASSUMPSIT for goods sold and delivered. *Plea—Non-assumpsit.* At the trial before Lord *Abinger*, at the last *Warwick* assizes, it appeared that the plaintiff sought to recover the sum of 33*l.*, the price of a certain machine made for the defendant by the plaintiff. The defendant proved that the machine was made upon a contract, by which it was stipulated that nothing should be paid for it unless it worked well, and that it did not work well. An objection to the admission of his evidence, under the general issue, was overruled by Lord *Abinger*, and the defendant obtained a verdict.

Whitehurst renewed the objection on a motion for a new trial, admitting that it was difficult to distinguish this case from that of *Cousins* v. *Paddon* (*a*).

Lord ABINGER, C. B.—The plaintiff did not declare on the special contract, and the defendant shewed that the work was done under a special contract, which had not been duly performed, so that *indebitatus assumpsit* could not be maintained.

PARKE, B.—The plaintiff could not have recovered upon the special contract, a condition precedent had not been performed; if it had been performed, *indebitatus assumpsit* might have been supported, but not otherwise; and therefore the defendant was at liberty, under the plea of *non-assumpsit*, to shew that it had not been performed.

Rule refused.

(*a*) Ante, Vol. I. 305.

ADAMS *v.* WORDLEY.

In an action on a bill of exchange, it was held to be an inadmissible defence, that by a contemporaneous parol agreement it was stipulated that payment should not be called for until the determination of another suit, and that that suit was still undetermined.

DEMURRER. Assumpsit by the drawer against the acceptor of two bills of exchange, dated 29th *December*, 1834, for 45*l.* each, payable, one sixth months, the other twelve months, after date. *Plea*—That long before the making by the plaintiff, and the accepting by the defendant, of either of said bills of exchange, to wit, on the 23rd of *January*, 1826, the defendant and *John Gaitt* had made their certain joint and several promissory note in writing, and thereby jointly and severally promised to pay to Messrs. *Henry Wyatt* and Sons, or their order, 300*l.* for value received, with interest at 5*l.* per cent. per annum from the date thereof, and which said promissory note the said *H. Wyatt* and Sons afterwards and before the making and accepting of either of the said bills of exchange, to wit, on the 31st of *October*, 1831, indorsed to certain persons using the name, style, and firm of Messrs. *Wyatt* and *Thompson*, and afterwards and before the making and accepting of either the said bills, to wit, on the day and year last aforesaid, the defendant paid to the said persons so using the name, &c. of Messrs. *Wyatt* and *Thompson*, as aforesaid, the said sum of money in the said promissory note specified, with the interest thereon; that the said *Wyatt* and *Thompson* then undertook and promised the defendant to deliver the said promissory note to him on request, but have hitherto neglected and refused to do so. And the defendant further saith, that afterwards and before, and at the time of making of the said bills of exchange, to wit, on the 29th of *December*, 1834, two actions had been and then were pending in the Court of Exchequer, in one of which actions the said plaintiff was the plaintiff, and the said defendant was defendant; and in the other of which, the said plaintiff was the plaintiff, and the said *John Gaitt* was the defendant; and both of which were commenced by the said plaintiff, for the recovery of the sum of money in the said promissory note specified, and which the plaintiff then claimed to be due to him as indorsee thereof, and such proceedings were thereupon had in both the said actions, that a question then arose and was depending, whether the defendant and the said *John Gaitt*, or either of them, was or was not liable to pay the sum of money in the said promissory note specified to the plaintiff. And the defendant further says, that long before the making and accepting of either of the said bills of exchange, to wit, on, &c. certain disputes had arisen, and were then depending between the plaintiff and *Mary Ann Bingley*, as administratrix of *Richard Bingley*, deceased, concerning a certain other sum of 300*l.*, which the plaintiff claimed to be due to him from the said *M. A. Bingley*, as such administratrix, as aforesaid, upon and by virtue of a certain other promissory note, of which the plaintiff was then the holder and indorsee, theretofore, to wit, on, &c. made by the said *R. Bingley*, deceased, by which he promised to pay, on demand, to one *George Wyatt*, or order, 300*l.* for value received, with interest, &c.; and afterwards, and at the time of making the said bills of exchange, and before the commencement of this suit, to wit, on the 29th of *December*, 1834, the plaintiff was about to bring a certain action at law against the said *M. A. Bingley*, as administratrix as aforesaid, to recover the said sum of money in the said last-mentioned promissory note specified. And the defendant further says, that afterwards, and before the making of the said bills of exchange, and

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before the commencement of this suit, to wit, on &c., the defendant was indebted to W. C., R. M., and J. F. G., as assignees of the estate and effects of the said *Wyatt* and *Thompson*, then being bankrupts, in a certain large sum of money, to wit, the sum of 117*l.* 6*s.* 6*d.*, if the defendant and the said *J. Gaitt* were discharged from all liability to the plaintiff, upon the said promissory note so by them made as aforesaid. And afterwards and before, &c. for settling the said actions, so as aforesaid depending between the plaintiff and the said *J. Gaitt*, and between the plaintiff and defendant, it was agreed by and between the plaintiff on the one part, and the defendant on the other part, that the plaintiff should not proceed further in the said actions, or either of them; and that the defendant should pay to G. S., then being the attorney of the plaintiff in the said actions, the costs incurred by the plaintiff in the prosecution of the same respectively, and that the plaintiff should make and draw his three several bills of exchange upon the defendant, each for the payment of 45*l.*, one at six months, another at twelve months, and the third at eighteen months, after the date thereof respectively, and which the defendant should then accept and deliver to the plaintiff, and that the defendant should pay to the plaintiff the said sum of 117*l.* 6*s.* 6*d.* so due to the said C. M. and G. as such assignees as aforesaid, if the defendant or the said *J. Gaitt* were not liable to pay to the plaintiff the said sum of money specified in the said promissory note so made by them, as aforesaid; and that the plaintiff should indemnify the defendant from all claims and demands, action and actions, which the said assignees might have upon the defendant in respect of the said sum of 117*l.* 6*s.* 6*d.*; and that upon payment of the said costs, and of the said sum of 117*l.* 6*s.* 6*d.*, and upon the defendant accepting the said bills of exchange, so to be drawn by the plaintiff upon and accepted by the defendant as aforesaid, he, the defendant, and the said *J. Gaitt*, should be discharged from all liability to the plaintiff upon the said promissory note so made by them, as aforesaid, if the plaintiff should recover in the said action so about to be commenced by him against the said *M. A. Bingley*, as such administratrix as aforesaid; and that until the plaintiff should so recover, or if he should not so recover, in such action, he, the plaintiff, should not require the defendant to pay any or either of the said three several bills of exchange, so to be made and drawn by the plaintiff upon and accepted by the defendant, as aforesaid. The plea then alleged, that the defendant paid the costs of the actions against him and *Gaitt*, and the said sum of 117*l.* 6*s.* 6*d.*, and accepted and delivered to the plaintiff the three bills drawn on him pursuant to the agreement; that the plaintiff afterwards commenced the action against *M. A. Bingley*, which was still pending and undetermined; and that the plaintiff had not as yet recovered against the said *M. A. Bingley* in such action; and that the bills in the declaration mentioned are two of the bills so drawn by the plaintiff upon and accepted by the defendant.

Special Demurrer—assigning for causes that the plea did not allege the agreement therein mentioned to have been in writing; and that the defendant, by his said plea, alleged a contract differing from and inconsistent with the contracts contained in the bills of exchange in the declaration mentioned, and sought by such contract so differing and being so inconsistent, to control, vary, and alter the contracts contained in such bills of exchange, and yet did not allege or shew such contract to have been in writing. *Joinder in Demurrer.*

Chandless, in support of the demurrer.—The plea attempts to vary by parol, the contents of a written instrument. It was decided, in *Forster* v. *Jolly*, (*a*) in which the authorities were reviewed, that a parol agreement by which the time of payment specified in the bill would be altered, was not an admissible defence. If necessary that the agreement should be in writing, a plea must allege it to have been so. *Case* v. *Barber* (*b*). [*Parke*, B.—We held so in a recent case (*c*).] The plea is bad on another ground—in not negativing any other consideration being given for the bill than that stated in the plea (*d*). The objection was taken in *Davis* v. *Holding* (*e*), but did not prevail there, because the plea disclosed that the consideration was illegal, and if any part of an entire consideration is illegal, the whole contract is vitiated; no subsequent consideration could set up an illegal contract. [*Chandless* was stopped by the Court.]

Tyndale, contrà.—Goss v. *Lord Nugent* (*f*) is an authority to shew that a written contract, which was not required by any statute to be in writing, may be altered in its terms at any time before breach by a parol agreement. [*Parke*, B.—That is not the objection; it is that the plea attempts to qualify a written instrument by a contemporaneous parol agreement.] It states a particular event by which the contract should be defeated. [*Parke*, B.—The plea in effect states an agreement to postpone the time of payment until the decision of the case of *Adams* v. *Bingley*.] As to the other objection, the plea shews sufficiently the contract, in consideration of which alone it must be taken the bill was given.

Lord ABINGER, C. B.—The proper course would have been to put the bills into the hands of a third party, to hold until the determination of the other action. As it is, the defendant is estopped from saying, that it was provided by parol that the time of payment should be different to that stated on the face of the instrument.

PARKE, B.—It is very clear that the plea seeks to extend the time for the payment of the bill, by setting up a contemporaneous parol agreement to that effect.

The other barons concurred.

Judgment for the plaintiff.

(*a*) 1 C. M. & R. 103, S. C. ante, vol. i. p. 10.
(*b*) Sir T. Raym. 450.
(*c*) Vide *Taylor* v. *Hilary*, ante, vol. i. p. 22.
(*d*) Vide *Noel* v. *Rich*, ante, vol. i. p. 325.
(*e*) 1 M. & W. 159. S. C. ante, vol. i. p. 380.
(*f*) 5 B. & Adol. 58.

KERBEY *v.* EDWARD DENBY, WILLIAM DENBY, WARREN and WESTERN.

TRESPASS, for breaking and entering the plaintiff's dwelling house, situate, &c. and making a great noise and disturbance therein, &c., and assaulting and imprisoning the plaintiff. The defendants *Warren* and *Western* pleaded

It is an essential part of a plea of justification of a trespass in an entry to take a party under a *ca. sa.* to state, that the outer door is open; therefore, the replication *de injuriâ* puts that fact in issue, and it is unnecessary to set out by a new assignment the abuse of the authority in breaking the outer door.

If there is an abuse of an authority, by which the party becomes a trespasser *ab initio*, the plaintiff is entitled to recover damages, as well for the part of the injury which would have been justified if there had been no abuse, as for that part which is directly caused by the abuse.

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first, Not Guilty; secondly, as to all the trespasses, except the breaking of the dwelling-house, a justification under a *capias ad satisfaciendum*, directed to the sheriff, &c. and a warrant thereupon directed by him to them, amongst other officers, alleging that by virtue of such writ and warrant, they entered the plaintiff's dwelling-house in order to execute the same, the outer door thereof being at that time open. The defendants *Edward* and *William Denby*, pleaded also, by a separate attorney, Not Guilty; and *William Denby*, pleaded alone (as to all the trespasses) as the servant, and by the command of *Warren* and *Western* the bailiffs, a similar justification under the writ and warrant to that pleaded by them. Lastly, *Edward Denby* pleaded alone as to the assault and imprisonment, that he committed such trespasses as the servant, and by the command of the said officers and bailiffs in the preceding plea mentioned; who, at the time of the committing of the trespasses, were acting under the authority and by virtue of the said warrant, and were then seeking and attempting, duly and lawfully, to take and arrest the plaintiff in the execution of the said warrant, to wit, by pointing out to the said officers, the dwelling-house and place of residence of the plaintiff, and directing and accompanying them thereto; and that he did, by the command of the said officers, and as their servant, accompany them to the said dwelling-house of the plaintiff and directed them thereto, and point out to them the said dwelling house, &c. as he lawfully might, and so, and not otherwise, committed the trespasses in the plea mentioned. To the special plea of *Warren* and *Western*, and also to that of *William Denby*, the replication was, that those defendants respectively, of their own wrong, and without the cause by them alleged, except so far as the said cause related to the said writ and warrant, and to the said command alleged by *William Denby*, committed the trespasses in these pleas respectively justified; and to the special plea of *Edward Denby*, that he of his own wrong committed the trespasses in that plea mentioned, without this, that he committed them as servant, and by the command of the officers. On these several replications, as well on the pleas Not Guilty, issues were joined.

At the trial before *Littledale*, J. at the last assizes for the county of *Devon*, it appeared that the defendants *Warren* and *Western* had received a writ of *ca. sa.* against the plaintiff, at the suit of the defendant *William Denby*. *Edward Denby*, *Warren*, and *Western* came to the plaintiff's house, and after having demanded admittance, broke open the outer door and effected an entrance; the plaintiff was taken into custody, and imprisoned for some days until he gave bail. The learned judge told the jury, that if all the essential parts of the pleas of justification were not made out, the defence rested on the general issue alone, and then they might give damages for the whole injury, and not for so much of the act complained of, in respect of which the special plea was not supported by proof. The jury were of opinion, that at the time of the entry by the defendants, the outer door was not open, and on the plea of Not Guilty, there being conflicting evidence whether *William Denby* was a party to the breaking of the outer door, they found a verdict for him, and against those as well as the other three defendants on the plea of justification, and a verdict against those three defendants on the general issue with 20*l.* damages. The learned judge gave leave to the defendants *Warren*, *Western*, and *William Denby*, to move to enter a verdict in their favour on the special plea.

Crowder now moved pursuant to the leave reserved, and also for a new trial on the ground of misdirection. It was objected at the trial on the part of the defendants who now move, that it was not in issue whether the outer door was open, that the only question was, whether the trespass was done on the occasion pleaded, if there was an abuse of the powers conferred by the process, it ought to have been specially replied. *Price* v. *Peck* (*a*). [*Parke*, B.—The sole question is whether it was a condition precedent to the right to execute the writ, that the outer door shall be open. The rule adopted in Comyn's Digest, (*b*) from Lord *Coke* is, that "the sheriff may enter the house of the defendant, when the door is open, and seize the goods of the defendant there found."] The learned judge misdirected the jury in telling them they might give damages from the whole injury sustained, and not for the breaking the outer door only. [Lord *Abinger*, C. B.—By the abuse he became a trespasser *ab initio;* the Six Carpenters' case (*c*); and therefore he cannot justify all. The provision of 11 G. 2. c. 19. s. 19. that an irregularity in a distress shall not make a man a trespasser *ab initio*, and confining the tenant's remedy to a special action on the case, indicates what the law would otherwise be.] But mitigatory circumstances are admissible in evidence under the general issue. [*Parke*, B.—There was nothing to authorize the defendants in depriving the plaintiff of his liberty.]

Lord ABINGER, C. B.—I am very unwilling to throw a doubt upon that which appears for a great length of time to have been the general course of pleading, and I am therefore indisposed to grant a rule. If any precedents to the contrary can be found, the case may be mentioned again; but I doubt very much whether any can be found.

PARKE, B.—I am very much mistaken if it is not already laid down in the authorities to be an essential part of the plea, that the outer door was open. Unless the court can be furnished with some authority, it must be taken that the rule is refused.

The case was not mentioned again; and on a subsequent day in the term, *Parke*, B. observed, that in this case no rule would be granted.

Rule refused.

(*a*) 1 Bing. N. C. 387. (*b*) Executrix, C. 5. (*c*) 8 Rep. 148.

BRIND *v.* HAMPSHIRE.

A party resident abroad drew a bill, and specially indorsed it to C. to whom he was indebted; he transmitted the bill to his agent who procured the acceptance of the drawees to the bill, and then gave C. notice that he had received instructions to pay him some money on account of his principal. Before any further communication between these parties, the agent was instructed by his principal not to pay over the bill to C. until his accounts had been investigated. No investigation took place. *Held*, that nothing had passed to make the bill the property of C. and that he could not maintain trover against the agent for it.

DEMURRER.—Trover for a foreign bill of exchange drawn at *Honduras*, dated 28th *August*, 1835, purporting to be drawn by *Hyde* and *Forbes*, upon and accepted by *Hyde* and Company, being for the payment to *William Usher*, Esq. or order of 300*l.* sterling, at ninety days sight, and purporting to be indorsed by the said *William Usher* to the order of Mrs. *Frances Brind*.

Third *Plea*—that heretofore, to wit, on the 21st of *October*, 1835, he the

defendant received the said bill of exchange from the said *William Usher* from parts beyond the seas, to wit, from *Belize, Honduras;* and was then directed by the said *William Usher* to hand over to Mrs. *Brind* the wife of the plaintiff, the said bill of exchange; but before the defendant could hand over to the said Mrs. *Brind* the said bill of exchange, and without any negligence or improper delay on the part of the defendant, and before any demand of the said bill of exchange by the plaintiff, or the said Mrs. *Brind,* and whilst the same was in the hands and possession of the defendant, on the direction and for the purpose aforesaid, to wit, on the 24th *Nov.* 1835, the said *William Usher* countermanded and revoked the said direction, and then directed the defendant to keep the said bill of exchange, and the proceeds thereof in his the defendant's hands, and not to hand over or deliver the said bill of exchange, or pay the proceeds thereof to the said Mrs. *Brind* or the plaintiff; whereupon he the defendant, pursuant to such revocation and countermand and subsequent direction of the said *William Usher,* to keep the said bill in his the defendant's hands, and the proceeds thereof, as aforesaid, and not to pay the same to the said Mrs. *Brind,* or the plaintiff, on the day and year aforesaid, did keep the said bill of exchange, and then detained and still detains the same in his the defendants hand and possession, and refuses to hand over or deliver the same to the said Mrs. *Brind* or the plaintiff for the cause aforesaid, and as he the defendant might and still may lawfully do for the cause aforesaid, and which is the said detaining, &c. whereof the plaintiff hath complained, &c.

Replication—That before the bill was received by the defendant as in the said plea mentioned, to wit, on the day first aforesaid, the same had been indorsed by the said *William Usher,* and he by that indorsement had ordered and appointed the said sum of money in the said bill mentioned to be paid to the order of the said Mrs. *Brind,* the wife of the said plaintiff, and that at the time of the detention thereof, the said indorsement remained thereon in full force and effect; and the plaintiff further saith, that afterwards and after the receiving of the said bill by the defendant for the purpose in the said plea mentioned, and before the detention thereof, and before the countermand and revocation in the said plea mentioned, to wit, on the day first aforesaid; he the said defendant caused the bill to be presented for acceptance, and caused the said bill to be accepted by the drawees; and that, after the said acceptance, and while the defendant so held the said bill for the purpose aforesaid, and before the countermand and revocation in the said plea mentioned, to wit, on the day first aforesaid, the defendant gave notice to Mrs. *Brind,* that he had received the said bill, and then held the same for the purpose aforesaid; and he then desired to be informed by the said Mrs. *Brind,* when and how the same should be delivered; and he then undertook and promised that such information should be attended to; and the said defendant then requested the plaintiff to pay the expenses of the conveying of the said notice from him the defendant to the said Mrs. *Brind*; and the plaintiff further saith that, in pursuance of such request, he the plaintiff did afterwards and and before the said countermand and revocation, to wit, on the day first aforesaid, pay the expense of the conveying of the said notice, to wit, &c. whereof the defendant afterwards to wit, on, &c. had notice.

Rejoinder—That at the time, and after he the defendant received the said bill from the said *William Usher,* as in the said plea mentioned; the said bill

remained, and thence, hitherto, has always remained and still is in the hands and possession of the defendant as the agent of and for the said *William Usher*, and subject to his direction, order, and control; and that whilst the said bill so remained, and was in the hands and possession of the defendant; the said *William Usher*, for good and sufficient reasons him thereto moving, did revoke and countermand the said direction, and then directed the defendant to keep the said bill of exchange and the proceeds thereof in his the defendant's hands, and not to hand over or deliver the said bill, or pay the proceeds thereof to the said Mrs. *Brind*, or to the plaintiff as in the said plea mentioned; and the defendant further saith that, before and at the time, and after the defendant so received the said bill from the said *William Usher*, the said Mrs. *Brind* kept a school for the board, lodging, and education of young persons; and divers, to wit, three children of the said *William Usher* were and had been at school with the said Mrs. *Brind*, before and at the time the defendant received the said bill as aforesaid, and had during that time been educated, boarded, and lodged by the said Mrs. *Brind*; and the said Mrs. *Brind* in respect of, and for the said board, education and lodging, had before the said *William Usher* remitted the said bill to the defendant for the purpose aforesaid, delivered certain accounts whereby the said *William Usher* appeared to be indebted to the said Mrs. *Brind* in divers large sums of money; and the said *William Usher*, for a long space of time, to wit, before and at the time of the said board, education, and lodging being supplied and given to the said children, as aforesaid, and thence hitherto had been, and was and still is resident in parts beyond the seas, to wit, at *Belize*, in *Honduras*, and before he the said *William Usher* did or could examine the said accounts so delivered by the said Mrs. *Brind*, he had forwarded and caused to be delivered the said bill of exchange to the defendant, for the purpose in the said plea mentioned; and the defendant further saith that, afterwards and before the defendant did or could deliver the said bill to the said Mrs. *Brind*, and whilst the same remained and was in the hands of the defendant as the agent of, and for the said *William Usher*, and subject to his directions as to the said bill; he the said *William Usher* revoked and countermanded the said direction to the defendant, directed him to keep the said bill and the proceeds thereof in his the defendants hands, &c. and, also, then and there directed the defendant to have a fair scrutiny into the said Mrs. *Brind's* accounts, and after a fair investigation, to pay her what might be due to her; whereupon, the defendant still being the agent of the said *William Usher*, and acting under his said directions, refused to pay over the said bill or the proceeds thereof to the said Mrs. *Brind*; and hath detained and still detains the same; and the defendant further saith that, on the 24th day of *October*, 1835, he the defendant wrote a letter to the said Mrs. *Brind*, that he the defendant had received a commission from the said *William Usher*, to pay her some money on account of his the said *William Usher's* children, which is the said notice in the replication mentioned to have been given by the defendant to the said Mrs. *Brind*, and therein alleged to be a notice that the defendant had received the said bill for the purpose in the said replication, in that behalf alleged; and the defendant further saith that, such notice was sent by the defendant, by and through the general post, to the said Mrs. *Brind*, and the defendant not having paid the postage thereof, the said Mrs. *Brind* or the plaintiff paid the postage of the same, which is the said expense of conveying the said notice

from him the defendant to the said Mrs. *Brind*, in the said replication mentioned; and the defendant saith that, by reason of the premises he did detain and doth still detain in his hands the said bill of exchange; and that he has had no fair scrutiny or investigation of the said accounts; and that he hath always been, and still is ready, on a fair scrutiny into the said Mrs. *Brind's* accounts, and after a fair investigation, to pay her what may be due to her pursuant to the said directions of the said *William Usher*, &c.

Surrejoinder—That the said revocation and countermand, and the said direction by the said *William Usher* in the plea and rejoinder mentioned was first had and received by the defendant, to wit, on the 28th day of *October*, 1835, and that the said revocation, &c. were not first had or received by the defendant until after the defendant caused the said bill to be accepted and after the same had been accepted by the drawers, and until after the defendant gave the said notice to the said Mrs. *Brind*, that he had received the bill for the purpose in the said plea mentioned, and that he held the same for that purpose; and until after the defendant desired to be informed by the said Mrs. *Brind*, when and how the same should be delivered, and until after the defendant undertook and promised that such information should be attended to, and until after the plaintiff paid the expense of conveying the said notice from the defendant to the said Mr. *Brind*, as in the said replication alleged, concluding to the country.

Special Demurrer, assigning several causes. The following ground of general demurrer was also stated in the margin of the demurrer book. That the surrejoinder is bad in law, because it appears by the pleadings, and is admitted by the surrejoinder that the defendant is the agent of Mr. *Usher*, and that the bill remains in the defendants hands, the same as in Mr. *Usher's;* indorsed but not delivered over to the indorsee Mrs. *Brind*, and no property in the bill had therefore passed to her or vested in her husband, in her right.

Hoggins cited the case of *Williams* v. *Everett* (*a*), and was then stopped by the Court.

Barstow, contrà.—The bill was remitted to the defendant for the purpose of being transferred to the plaintiffs, and the defendant having indorsed the bill, the property in it became vested in the plaintiff. *Williams* v. *Everett* proceeded on the ground that there was no privity between the plaintiff and the defendants, the defendant there had not assented in any way to the transfer of the property to the plaintiff. [*Parke*, B.—In the present case there was no delivery; indorsement in law comprises writing on the back, and a delivery to the indorsee.] In an action by a special indorsee, it would not be necessary to aver delivery. [*Parke*, B.—No, but it would be implied in the allegation of indorsement. You must make out an actual delivery of the bill, or that the defendant consented to hold it as the agent of the plaintiff.] The defendant received the bill on the express terms that he was to hand it over to the plaintiff, and he has so dealt with it, that he cannot now say, he has not held it for that purpose. In consequence of the notice to the plaintiff, her situation was altered. [*Parke*, B.—There is no allegation that the defen-

(*a*) 14 East, 582.

dant consented to accept the bill in payment.] The authority being given on good consideration, and partly acted on, was irrevocable.

Lord ABINGER, C. B.—The case appears to me to be the same as if *Usher* had himself caused the bill to be accepted, and had afterwards written an indorsement upon it, without delivering it to the plaintiff, who in that case could not have maintained trover for it, nor can the plaintiff now.

PARKE, B.—I am of the same opinion. I think nothing was done to transfer the property of the bill to the plaintiff. The notice given by the defendant did not prevent the authority being countermandable until executed, either by a delivery of the bill itself, or until an equivalent act had been done, which precluded the defendant from saying the bill was not delivered. That is the doctrine of *Williams* v. *Everett* (*a*). *Scott* v. *Porcher* (*b*). Now it is quite clear that the bill was not handed over, and I think there was no contract between the plaintiff and the defendant, that he should hold the bill as the plaintiff's agent. There is no new consideration between the plaintiff and the defendant, nor any assent by the plaintiff to the defendant being his agent in holding the bill; there was nothing to alter the situation of the parties, nothing more than an inchoate contract which was never completed.

BOLLAND, B.—*Williams* v. *Everett*, was an action in a different form, but the principle of it ought to govern the present case. I think that nothing has passed between the parties which can distinguish their situation from that of the parties in *Williams* v. *Everett*. No new engagement has been entered into with the plaintiff who was the object of the remittance, by which the defendant is precluded from saying he continued to hold the bill as the agent of the remitter.

ALDERSON, B., concurred. Judgment for the defendant.

(*a*) 14 East, 582. (*b*) 3 Merivale, 652.

GRAHAM *v.* PARTRIDGE.

DEBT for goods sold, &c. *Plea—Nunquam indebitatus*, with notice of set-off.

A set-off must be specially pleaded; it cannot be given in evidence under a plea of *nunquam indebitatus*, with a notice of set-off.

At the trial before Lord *Abinger*, at the last assizes for the county of *Warwick*, on the defendant offering evidence of a set-off, it was objected that since the new pleading rules, a set-off must be specially pleaded, and could not be given in evidence under the plea of *nunquam indebitatus*, with a notice. Lord *Abinger* was of this opinion, and rejected the evidence; the plaintiff had a verdict.

Humfrey obtained a rule for a new trial, on the ground that the evidence was improperly rejected.

Goulburn, Serjt., and *Hayes*, shewed cause. The question raised by the

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defendant is, whether the judges had any power to alter the law of pleading, in regard to the defence of set-off; or whether their authority was controlled in this respect by the proviso of the 3 & 4 W. 4, c. 42, s. 1.

The defence of set-off was not within the intention of that proviso, which was doubtless framed with the view of preserving the privileges of particular classes of persons, such as magistrates, peace-officers, revenue-officers, persons acting under the authority of particular statutes and the like, who by various legislative enactments were entitled to an exemption from the strict rules of pleading by which others were bound. Such persons are, from their situation, liable to be harassed by vexatious actions, when acting in the discharge of their duties; and on this ground the legislature has thought it reasonable to allow them peculiar privileges and facilities in defending themselves. But the defence of set-off does not fall within the principle of these cases: it is open to all defendants, and no reason can be assigned why it should be regarded with greater favour than any other defence in confession and avoidance. Unless, therefore, the words of the proviso are very clear, the Court will not construe them so as to embrace a case which was not within their reason and intention. The words are, "that no such rule shall have the effect of depriving any person of the power of pleading the general issue, and giving *the special matter* in evidence in any case where he is now or hereafter shall be entitled to do so by virtue of any act of parliament now or hereafter to be made." By the words, "*the special matter*," the legislature must have meant matter which, according to the general rules of pleading, ought to be the subject of a special plea. And the whole scope of the proviso shews, that it was only intended to apply to cases in which, by the express provisions of some statute, a defendant was empowered to give in evidence under the general issue matter which, by the ordinary rules of pleading, ought to be pleaded specially. But the statutes of set-off did not introduce any relaxation from the rules of pleading: they introduced a new species of defence, but left the rules of pleading as they were before the defence of set-off was introduced, except by requiring that this new defence should in no case be given in evidence under the general issue, unless the plaintiff had notice that it was intended to be set up. Before the statute 2 Geo. 2. c. 22. s. 13. a cross demand could not be set up as a defence, but could only be enforced in a cross action, but that statute enacts, that where there are mutual debts, "one debt may be set off against the other." The statute does not, however, empower defendants in all cases to avail themselves of this defence under the general issue, but only enacts, "that such matter may be given in evidence under the general issue or pleading specially *as the nature of the case shall require*, so as at the time of his pleading the general issue, where any such debt, &c. is intended to be insisted on in evidence, notice shall be given, &c. By the words "as the nature of the case shall require," the legislature intended to refer to the existing forms of action and rules of pleading. And their meaning was, that whenever the general issue was of so broad and comprehensive a description as to be applicable to this new defence, the defendant should be allowed to prove a set-off under it, provided he gave notice that in cases where there was no such general and comprehensive plea, it should be pleaded specially. The question of set-off could only arise in debt, assumpsit, and covenant. In debt or simple contract, the general plea of *nil debet* was applicable to every species of defence, by way of confession and avoidance, which had the effect of negativing an existing debt. And in

assumpsit the plea of non-assumpsit had the same extensive operation, and admitted of every species of defence which negatived an existing liability upon which the implied assumpsit was founded. And as the statute of set-off enabled defendants, if they thought proper, to apply a cross demand of their own in liquidation and satisfaction of the demand of the plaintiff, this would have been a good defence under *nil debet* or *non-assumpsit*, if the statute had been entirely silent as to the mode of pleading. But in debt or specialty, or in covenant, the general issue *non est factum* was, from its nature, totally inapplicable to any defence by way of confession or avoidance, and in these cases a special plea of set-off would have been required if the statute had said nothing on the subject. It was, no doubt, in reference to these distinctions that the provision as to the mode in which the defence of set-off should be insisted on was introduced in the statute of set-off; and the object of the provision was not ro relax the rules of pleading, but merely to require that in no case should the defendant avail himself of a cross demand by way of defence without giving the plaintiff notice beforehand. [*Parke*, B.—According to your argument, then, the statute was not enabling, but restrictive.] It was enabling in so far as it gave a new species of defence, but with regard to the new forms of pleading, it was restrictive. In *Oldershaw* v. *Thompson* (*a*), it was decided, that a set-off could not be given in evidence under *non est factum;* and *Bayley*, J. refers particularly to the inapplicability of the language of the plea to such a defence. No relaxation of the rules of pleading was, therefore, introduced by the statutes of set-off; and, consequently, this defence is not within the proviso of the statute 3 & 4 W. 4, c. 41, s. 1.

But, 2dly, even if the proviso of the statute did apply, the defendant cannot avail himself of the point in the present case; for he has adopted the new form of plea given by the judges, viz., "that he never was indebted." And this plea is equally inapplicable to the defence of set-off as the plea of *non est factum*. In order to raise the question, he ought to have pleaded *nil debet*, and he might then have concluded that the judges had no power to deprive him of the right of pleading this plea. The new form of plea may be now termed the general issue in debt, but it was not the general issue referred to by the statute of set-off. (They were then stopped by the Court.)

Gale, in support of the rule.—If the judges had no power directly to deprive a defendant of the right given him by statute to plead the general issue, with a notice, and give the special matter in evidence, they could not do it indirectly by a regulation forbidding that plea; and as the rule is positive that the plea of *nil debet* shall not be allowed, it must be taken that the judges have done that which they had a right to do, and not that which they were forbidden to do by the statute; and they had power to alter the form of the general issue, but not to lessen the effect of the general issue when the right to plead it was given by any statute. The present is an instance in which the set-off may be given under the general issue by force of a statute,—the 2 G. 2 c. 22, s. 13. Before that statute a cross demand was not an answer; that stat. gives the defence, and at the same time points out the mode in which it is to be pleaded. Nor does the necessity of a notice raise any inference that the whole clause is to be considered restrictive of the general right of pleading.

(*a*) 5 M. & S. 164.

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The notice formed no part of the record, nor can it be said that the evidence of set-off was received under any thing but the plea; the record of *nisi prius* is the only authority to a judge to try a cause and receive evidence according to the different issues raised on it. The case is analogous to that of an action brought by the assignees of a bankrupt, in which the different requisites of the bankruptcy cannot be disputed at the trial, unless notice of an intention to dispute those points is given; but the evidence, when received, is received under the pleas, and not under the notice. As to the case of *Oldershaw* v. *Thompson*, that was an action of covenant, in which there was no general issue, and to which, consequently, the statute required the plea to be special.

Lord ABINGER, C. B.—I am of opinion this rule must be discharged. It has been contended that the judges had not the power to make the rule which they did with respect to the plea of set-off. It is said that the statute of George the Second, which gives a defence in actions of debt of set-off, gives, under the general issue, the power of giving this evidence; and that, therefore, the case comes within the proviso of the statute 3 & 4 W. 4, c. 42, s. 1. I thought, at the trial, on a view of the statute, that the proviso was to except out of the power given to the judges those cases only where the general issue is pleaded as a protection to ascertain classes of persons who are employed for the public benefit in some sort of way, such as magistrates, constables, and other officers. For the protection of these persons acting for the public benefit, there are various statutes. It is obvious these cases are distinguishable from the present case; the defence under the statute of set-off applies to all the king's subjects generally, and the statute of set-off was not intended to give any privilege or protection to them, but to put them all on an equal footing, and whatever doubt might arise on a form of words, it appears to us, that Mr. *Hayes*, in his argument, has given an answer to it. The statute does not give the plea of the general issue, but says only this, that a set-off shall be a defence to an action at law. In an action of debt or assumpsit, it might have been given in evidence under the general issue. No doubt at all about that, in an action on a bond it must have been pleaded specially. The statute goes on to say, that, at the time of pleading the general issue, the defendant must give a notice of his intention to give evidence of set-off under it; that was meant to act as a restriction. It appears to me the judges did not abuse the powers given them by the act when they made this order; and the verdict cannot be set aside on that ground.

PARKE, B.—I think this rule should be discharged. It appears to me, that the ruling of Lord *Abinger* was quite right, and that the new rules have full effect in this case. Certainly, the fifteen judges who framed these rules had no idea this act was to restrain them from making this regulation. That I happen to know from my own knowledge; but they might still have been mistaken in that respect. I am happy to say, that it appears to us, from the very ingenious argument offered on the part of the plaintiff, that the judges were so authorized. The statute enables parties to give in ordinary cases that evidence under the general issue which, but for the provisions in this act of parliament, they would not be able to do. It is to suit such cases the proviso was introduced, and not to confer a benefit which

had not been given before the statute of set-off. So far as relates to pleading, the act was meant to be restrictive, and to prevent parties giving evidence under it until they had complied with the provisions of the act and given a previous notice. I think also there is great weight in the argument that if the defendant sought to give the general issue in evidence of the set-off under the general issue, this is not that species of general issue which he ought to have pleaded, and that he ought to have pleaded *nil debet*. It seems to me, on these two grounds, but more particularly the former, that the notice was wholly inoperative, and that he could not give this evidence of set-off under the plea of *nunquam indebitatus*.

BOLLAND, B.—I am of the same opinion.

Rule discharged.

HARDING *v.* STOKES.

The corruption of a voter at a municipal election, by promise of an employment is, under the stat. 5 & 6 W. 4, c. 76, s. 54, an offence in the party promising.

DEBT for a penalty of 50*l.*, alleged to have been incurred under the 5 & 6 W. 4, c. 76, s. 54. The declaration stated, that the borough of *Bristol* is a borough in which, by a certain act of Parliament made and passed in the sixth year of the reign of his present Majesty, intituled "An Act to provide for the Regulation of Municipal Corporations in England and Wales," it was provided and directed, that an election should be had and made of a certain number of fit persons, who should be and be called the councillors of the said borough; that theretofore, to wit, on the 26th of *December*, 1835, the election of such councillors took place, in pursuance of the said act, and before and at the said election, R. P., J. B., and H. G. were candidates to be elected councillors of the said borough; and the plaintiff, in fact, saith, that the defendant, not regarding the statute in that case made and provided, before the said election, to wit, on the 24th day of *December*, in the year last aforesaid, did corrupt one J. W., who then and from thenceforth until and at the time of the said election, had a right to vote in the said election, to give his vote in that election for the said R. P., J. B., and H. G., so being such candidates as aforesaid, by their corruptly promising to give the said J. W., if he should vote in the said election for the said R. P., J. B., and H. G., employment in hauling stones at and for certain hire and reward to be paid for the same, which said employment was so then promised by the said defendant to the said J. W. as and for a reward to the said J. W. so to give his vote for the said R. P., J. B., and H. G., contrary to the form of the statute in such case made and provided; whereby, and by force of the said statute, the defendant forfeited for his said offence the sum of 50*l.*; and an action hath accrued, &c.

General demurrer and joinder.

The points stated for argument on the part of the defendant were as follows:—The defendant contends that, inasmuch as in the statute 5 & 6 W. 4, c. 76, s. 54(*a*), the word employment is used with reference to the voter,

(*a*) And be it enacted, that if any person who shall have or claim to have any right to vote in any election of mayor, or of a councillor, auditor, or assessor of any borough, shall, after the passing of this act, ask or take any money or other reward by way of gift, loan, or other device, or agree or contract for any money, gift, office, employ-

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but not to the person influencing the voter, the defendant did not become liable to the penalty by promising employment to the voter; that the employment of hauling stones is not a gift or reward within the meaning of the statute; that although employment at unreasonable wages might have been within the statute, the declaration does not state such a case, and it ought to have enabled the Court to see that an offence had been committed within the statute, and that it is consistent with the declaration that the alleged promise to the voter was made before the passing of the statute.

Whateley, in support of the demurrer.—The 54th section of the statute, on which this action is founded, contains two distinct provisions, one affecting the persons offering or giving a bribe, the other persons receiving one. The provision affecting the latter class is more extensive than the other; it prohibits the taking not only of any money, but of any "office, employment, or other reward whatsoever." These words are omitted in the other part of the section, and cannot be introduced by construction, particularly as this is a penal statute. The present offer cannot be said to be either of a gift or reward within the words of the second part of the section. Conceding, however, that the offer of an employment might be within the act, it is not an offence simply, but only when used as a means of giving a reward for a vote, and as it cannot be intended in this declaration that any exorbitant wages were to be given, there is no reward; at the usual wages, the remuneration and the services would be equivalent, and, therefore, not a benefit offered within the meaning of the statute. The declaration ought to have set out the terms of the contract. The declaration is bad in not shewing that the offence was committed after the passing of the act.

Addison, contrà.—The whole clause must be looked at. It is true that the words "office" and "employment" are not contained in the second branch of the clause; but they are, in effect, repeated by the words "gift or reward." [*Parke*, B.—Giving money could not be within the second branch, unless it is comprised in the general words.] Then it is not disputed, that an engagement to haul stones is an employment, and it is not necessary that it should be by way of colour for a gift of money; it is distinctly averred, that the voter was corrupted by the promise. This is a penal clause, it is true; but the Court must not, in a statute, whether penal or not, by a refinement of construction, prevent the operation evidently intended by the legislature. *Henslow* v. *Fawcett* (*b*). It sufficiently appears upon the declaration that the pro-

ment, or other reward whatsoever, to give or forbear to give his vote in any such election, or if any person, by himself or any person employed by him, shall, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure, or offer to corrupt or procure, any person to give or forbear to give his vote in any such election, such person so offending in any of the cases aforesaid shall for every such offence forfeit the sum of fifty pounds of lawful money of *Great Britain*, to be recovered, with full costs of suit, by any one who shall sue for the same, by action of debt, bill, plaint, or information in any of his Majesty's courts of record at *Westminster*; and any person offending in any of the cases aforesaid, being lawfully convicted thereof, shall for ever be disabled to vote in any election in such borough, or in any municipal or parliamentary election whatever in any part of the United Kingdom, and also shall for ever be disabled to hold, exercise, or enjoy any office or franchise to which he then shall or at any time afterwards may be entitled as a burgess of such borough, as if such person was naturally dead."

(*b*) 3 Ad. & Ell. 51; S. C. 1 Harr. & Woll. 126.

mise of the employment was made after the passing of the act; proceedings are stated to have been had under the statute, and upon the occasion of those proceedings the offence is alleged to have been committed.

Whateley replied.

Lord ABINGER, C. B.—I think this case is within the act of Parliament. The word employment is not so used as to shew it has no connection with the words that precede it, but the form is, "employment or other reward," which shews that employment was looked at as in the nature of a reward, for "other reward" implies any species of reward. It might be a question for the jury whether the employment of hauling stones was a reward or not: that question is to be tried by the jury. The act of Parliament seems to have considered any employment by means of which a man may derive an advantage to be a reward. It may be considered as a reward where there are many candidates, and but little work to do. The offering of work, though it be the hauling of stones, may be considered a benefit.

PARKE, B.—I am of the same opinion. It appears to me this declaration is quite sufficient. The question that arises in this case as to the construction of the act of Parliament is,—whether the legislature meant to make any difference between what is asked and what is offered; it appears to me to be clear they did not. For the solution of the question, what is a gift or reward, we must look to the former part of the section. We shall then see, that the penalty is on the person asking for money, or any reward. The legislature treat employment as a reward; and certainly, in the common sense and common understanding of the word, it is so to a person who wants employment; so that employment may fall under the designation of reward under the section on which this declaration is framed. Then let us look to the declaration to see whether there has been any corrupt offer. It is averred, there was a corrupt promise to give employment by hauling stones, and that is an employment for which money is to be received, and the declaration avers it was promised as a reward for him to vote. Unless it is proved to be so to the entire satisfaction of the jury, the offence would not be committed. Then, as to the last objection, I think Mr. *Addison's* answer is satisfactory.

BOLLAND, B.—I am of the same opinion. This is a penal act, and is a remedial act also. I have no doubt the legislature considered it as a reward.

ALDERSON, B.—I am of the same opinion. The first clause of the section subjects to a penalty both the person who offers employment or other reward, and the man who asks the same, the condition being he should promise to give his vote, or forbear giving the same. It seems to me the word reward, in fact, is to be taken as including employment, and whether it is for value is a question of fact for the jury. If it was shewn the engagement was made for the ordinary wages, they might find the party did not give the employment with any corrupt view. That is not a question for the Court. But it is averred here, that it was given to corrupt a voter. That is stated on the face of the declaration; and if that be so, it is clearly within the act, and the party would be liable to the penalty. If we were to investigate the condition

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of men, we must also investigate their minds and characters, when we should find, that the employment of hauling stones, though a punishment to some people, might and would be looked on in the light of reward by others.

Whateley applied for leave to amend, which was granted, on payment of costs; otherwise, Judgment for the plaintiff.

BOLD *v.* RAYNER.

A broker made a contract, and gave bought and sold notes: 1. We have this day bought for you 100 tons dry palm oil, "the above oil to be delivered by the sellers for the *Speedy* OR *Charlotte*, *expected* to arrive about *November* or *December* next." 2. We have this day sold for you 100 tons of dry palm oil, "ex *Speedy* and *Charlotte*, to arrive."—*Held*, that evidence of mercantile usage was admissible to shew that both these notes had the same meaning, being intended to represent that the oil should arrive by one or other of these vessels, to be delivered from either vessel at the option of the seller.

ASSUMPSIT for 100 tons of palm oil, bargained and sold by the plaintiff to the defendant. At the trial, before *Parke*, B., at the last *Spring* Assizes for *Liverpool*, it was in evidence, that the contract was made in *September*, 1833, by Messrs. *Roscow* and *Rigg*, brokers, at *Liverpool*, who gave the following bought and sold notes:—

"Mr. *J. B. Rayner.*

"We have this day bought, for your account, from *J. O. Bold*, one hundred tons dry palm oil, at 31*l.* 10*s.* per ton; also, from the same party, one hundred tons ditto, for Messrs. *Judson* and *Wilson*, at 31*l.* 10*s.* per ton, to be taken from the quay at landing weights, with customary allowances, and a fair proportion of breakers, to be taken at an allowance of twenty-four per cent. payment in cash, in fourteen days from the delivery of the oil, less 2½ per cent discount. The above-mentioned oil to be delivered by the sellers from the *Speedy* or *Charlotte*, expected to arrive here about *November* or *December* next; and should the said vessel be lost, this contract to be void.

"We are, Sir,
Your obedient servants,
Roscow and *Rigg*."

"Mr. *J. O. Bold.*

"Sir,—We have this day sold, for your account, to Messrs. *Judson* and *Wilson*, payment in fourteen days by cash, less 2½ per cent. discount from delivery, one hundred tons dry palm oil, at 31*l.* 10*s.* per ton; also, to Mr. *J. B. Rayner*, payment as above, one hundred tons dry palm oil, at 31*l.* 10*s.* per ton, ex *Speedy* and *Charlotte*, to arrive.

We are, Sir, &c.
Roscow and *Rigg*."

The *Speedy* was lost on her voyage; the *Charlotte* arrived in *May*, 1834. The evidence of the custom at *Liverpool* was, that two vessels being named in the contract, the oil might be delivered from either, at the option of the seller; that when a vessel was warranted to arrive by a given time, the buyer was not bound to take the cargo, unless it arrived within that time; but that if it was only stated, that the vessel was expected to arrive within a certain time, the purchaser was bound whenever she arrived.

It was objected, on the part of the defendant, that there were material variances between the bought and sold notes, and that parol evidence was inadmissible to explain them. The learned judge overruled the objection,

giving the defendant leave to move to enter a nonsuit. The plaintiff had a verdict.

Alexander now moved to enter a nonsuit, pursuant to the leave reserved.—If there be a material variance between the bought and sold notes, the contract is not valid.—*Thornton* v. *Kempster* (*a*). There are material variances. The sold note sets out a contract, which is conditional upon the arrival of the *Speedy* or *Charlotte;* the bought note contains a simple contract for a certain quantity of oil. [Lord *Abinger.*—I think, taking the two notes together, they are consistent, and contain a contract for the delivery of oil from the vessels named. Then there is a second important variance. The sold note states the contract to be conditional on the arrival of both vessels; the bought note contains a contract obligatory on the arrival of either of them. [*Parke,* B.—The jury found that, according to the custom, the seller, who had to do the first act, had the option to deliver from either vessel.]

Then it becomes a question, whether evidence of mercantile usage was admissible to explain a written contract. Generally speaking, mercantile usage is admissible to explain a mercantile contract; but the rule is not universal where terms of an ordinary and received import are used in a contract which is intelligible upon the supposition that they were used in their ordinary sense. Of that opinion the Court of King's Bench appeared to be in *Cross* v. *Eglin* (*b*); and in *Whitaker* v. *Mason* (*c*), *Tindal,* C. J. adverts to the question, whether even a contract which is silent as to a particular point may have that silence supplied, as a question of difficulty. [Lord *Abinger.*—Parol evidence has been admitted to shew that, by custom of a particular district, "a thousand" meant twelve hundred (*d*).] The word "and" is material; and it cannot be said that the evidence was, that in that district it had acquired the meaning of "or."

Lord ABINGER, C. B.—It appears to me, that there is no substantial difference between the two notes, though one may be rather more full than the other. They both contain a statement that the vessels were expected to arrive. The contract might be avoided if that representation were false.

PARKE, B.—I am of the same opinion. I think there is no doubt the evidence was properly admitted; and that being admitted, there was an end of the question. The evidence was all on one side, and the jury had no difficulty in finding in favour of the plaintiff.

BOLLAND, B.—I think the two notes are substantially the same.

Rule refused.

(*a*) 1 Marshall, 355.
(*b*) 2 B. & Adol. 106.
(*c*) 2 Bing. N. C. 370. S. C. 1 Hodges, 323.
(*d*) *Smith* v. *Wilson,* 3 B. & Adol. 728.

Exchequer.

M'GAHEY, Vestry Clerk of St. Pancras, Middlesex, *v.* ALSTON and another.

Subordinate officers appointed under the St. Pancras Paving Act, have not annual offices: they hold during the pleasure of the vestry; and, therefore, bonds given by them to the directors continue in force after the directors have retired from office.

DEMURRER. Debt on a bond, dated 1st of *January* 1834, given by the defendant to the directors of the poor of the parish of *St. Pancras*, and their successors in the penal sum of 500*l*. The plea craved oyer of the bond and condition, which after reciting that the defendant *Alston* had, in pursuance of the powers and authorities contained in an Act of Parliament passed in the 59th year of the reign of King George III. intituled "An Act for Establishing a Select Vestry in the parish of *St. Pancras*, in the County of *Middlesex*, and for other Purposes relating thereto," been elected and appointed an officer or servant of the vestrymen and directors of the poor of the parish of *St. Pancras*, under the title or denomination of paying agent or accountant—was for the faithful execution of such office, so that no loss or injury should be sustained by the vestrymen or directors, or their successors, or by the parishioners; and for the faithful accounting upon oath, at the weekly and other meetings of the directors and their successors, and at all other times when required by the vestrymen or directors for all monies received in the execution of the office, &c. and it provided also, that the defendant should within ten days next after he should have been removed from or have quitted his said office, make up his accounts, and pay over any balance in his hands to the treasurer or clerk of the vestrymen or directors for the time being, and deliver up his books and papers to the vestrymen or directors, or their successors, or their clerk or clerks for the time being, &c. The defendants then pleaded that, at the time of the said supposed writing obligatory, the said office of directors of the poor of the parish of *St. Pancras*, was and still is an annual office; and that the office of the said directors, who were in office at the time of the making of the said writing obligatory, expired before the commencement of this suit, to wit, on the 31st of *March*, 1834, and that the defendant *Alston*, did, after the making of the said writing obligatory, during the continuance in office of the said last-mentioned directors, who were in office at the time of making the said writing obligatory, to wit, from the time of making the same until the 31st of *March*, 1834, when the said last-mentioned directors, went out of the said office, well, and faithfully execute the said office of paying agent and accountant, in such manner that no loss, damage, or injury hath been or can be sustained by the said vestrymen of the said parish, or by the said directors or their successors, or by the said parishioners, &c. &c. The plea then averred performance during the same period in respect to all the other matters mentioned in the condition.

General Demurrer and Joinder.—The ground of demurrer stated in the margin was, that the office was not determined by the retirement of the directors.

Peacock, in support of the demurrer. It appears by reference to the local act, on which this question turns, the *St. Pancras* Vestry, 59 G. 3. c. xxxix. s. 3, 19, & 41. that the subordinate officers are appointed by the vestry; the paying agent, who is one of them, is not an annual, but a continuing officer,

until removal. The directors, it is true, have an annual office, but a bond given to them while in office is not determined on their retirement from it, on the ground that it was given to them in their character of directors. [*Parke*, B.—The directors have nothing to do with the appointment of subordinate officers, except in their character of vestrymen.]

Tomlinson, contrà.—There are provisions in the act which warrant an argument that the office in question, was at the utmost an annual one. By s. 19. the salaries are to be paid "yearly, or otherwise." By s. 21. the officers are to account and deliver up their books within ten days after going out of office to the directors for the time being. If the paid agent is a servant of the vestrymen and directors when the latter go out of office, the contract is determined, because an integral part of one of the contracting parties is gone.

Lord ABINGER, C. B.—According to the argument, if a subordinate officer were appointed a week before the directors went out of office, a new appointment and a new bond would be necessary. Such a construction is not warranted by any thing set out in the condition of the bond, as contained in the statute. The judgment must be for the plaintiff.

Judgment for the plaintiff.

PERSE *v.* BROWNING.

BAYLEY, moved for a rule to take out of court money paid in, in lieu of bail to the sheriff, on the ground of irregularity in the affidavit of debt and capias. The affidavit of debt appeared to have been made before a commissioner in the Common Pleas and Exchequer, and it seemed from the entitling of the affidavit "in the Court of Exchequer," being in a different hand writing, that that had been inserted after the affidavit was sworn.

It is no objection to an affidavit of debt sworn before a commissioner, that there was then no title to the affidavit, if it appear in the jurat that it was sworn before a commissioner of the court in which it was used. The title may be added after it is sworn.

PARKE, B.—If that were so, it would not be an objection to the affidavit; it appears to have been sworn before a commissioner who was a commissioner of this Court.

The other judges concurred.

Humfrey showed cause in the first instance.

Upon an objection to the capias, that it was directed to the sheriffs of *Middlesex*, instead of the sheriff, the Court made the rule absolute, to set aside the writ with costs, upon the terms that the defendant should bring no action for the arrest against the sheriff, or the plaintiff, and that the plaintiff should be at liberty to arrest the defendant again.

Rule accordingly.

Exchequer.

DOE dem. BEARD *v.* ROE.

It is not necessary that a notice to a tenant under the stat. 1 G. 4, c. 87, should state it to be signed by the agent of the lessor of the plaintiff. It is sufficient to state that it is signed by the agent of the landlord.

Nor is it necessary to set out at length what the tenant will be required to do under the statute.

GASELEE obtained a rule to shew cause why an order of *Gurney*, B. should not be set aside. The order directed a declaration in ejectment, and notice under the stat. 1 W. 4. c. 87. s. 1. to be set aside for irregularity.

Mansel shewed cause. The notice was signed by "A. J. agent for the above-named plaintiff," and landlady of the premises in the declaration: it ought to be signed by the party. [*Parke*, B.—It is sufficient if it appears that the notice was given by, or on behalf of the landlord.] There is another objection, the notice does not state for what purpose it is given him; it merely requires him to appear and be made defendant, and find such "bail if ordered by the Court, and for such purposes as are specified in and by an act of parliament made and passed in the first year of the reign of his majesty, intitled an act (setting out the title.)

Gaselee.—On the last point, the notice pursues the form given in Tidd's Appendix (*a*).

Per Curiam.—The notice is sufficient. It must be followed by a rule *nisi*, in which the tenant will be more fully informed what he is required to do.

Rule absolute.

(*a*) 9th edit. p. 623, § 29.

KIRTON *v.* BRAITHWATE.

A plaintiff's attorney wrote a letter demanding a debt and 6*s*. 8*d*. for charges, and stating that if the same were not paid at his office before a certain time, proceedings would be taken:—*Held*, *Parke*, B., *dubitante*, that a tender, to the clerk at the office before the time, of the debt only, was a good tender.

DEBT for goods sold and delivered, &c., issue joined on a plea of tender of 3*l*. 6*s*. 9*d*. In support of the plea, evidence was given of a letter written by the plaintiff's attorney to the defendant demanding 3*l*. 6*s*. 9*d*. informing him that, unless the same, with his charges, were paid by the ensuing *Wednesday* at 12o'clock, proceedings would be commenced. The charge was 6*s*. 8*d*. in addition to the debt. The defendant's clerk stated that he went to the plaintiff's attorney's office on *Wednesday* morning, shortly after 10 o'clock one of the clerks, a boy, came in, and the witness tendered to him 3*l*. 6*s*. 9*d*. the clerk refused to take it unless the 6*s*. 8*d*. were also paid. Some conflicting evidence as to whether a tender was actually made or not, was left to the jury, who found for the defendant. *Knowles* obtained a rule for a new trial, on the ground that a tender to the attorney's clerk was not a good tender.

Humfrey shewed cause.—The attorney of the plaintiff having required payment to be made at his office within a certain time, authorized a tender to whomsoever was usually there, and the tender had precisely the same effect as if made to the plaintiff himself. The attorney's clerk being usually there, was his agent, whether expressly authorized to receive a tender or not.

Knowles, contrà.—If the clerk who was there had not express authority to receive the sum tendered, the tender is not good. In *Goodlard* v. *Blewith* (*a*), Lord *Ellenborough* said, "a tender to an agent authorized to receive payment is as good as a tender to the creditor in person." Here the authority given to make or receive a tender was only of the sum of 3*l.* 13*s.* 6*d.* *Barrett* v. *Deere* was a case of payment in the usual course of trade.

Lord ABINGER, C. B.—I think without the letter there would have been no authority to have made the tender to this clerk; for the attorney had expressly stated the money was to be tendered at his office before 12 o'clock on the *Wednesday* morning, together with the expenses of the letter, which he had no right to exact. I think it is an implied authority, that some person would be there with permission to receive that which was justly due to the plaintiff. Under these circumstances, I do not see what objection could be made to the tender at the office.

PARKE, B.—I own I feel some doubt on the question. There is no doubt that in order to make a good tender, it must be made either to the plaintiff himself, or some agent who is authorised to give a receipt for the money. We must assume the agent had no previous authority, as it has not been left to the jury to say whether he had any such authority. The question then resolves itself into the construction to be put upon this letter: it certainly implies there will be some person at the office, and that that person, whoever he may be, will have authority to receive the money: that is the effect of the letter. The words of it are, "I am instructed to apply to you for payment of the sum of 3*l.* 6*s.* 9*d.*, and unless the same, together with my charge, as under, is paid at my office on *Wednesday*, at twelve, proceedings will be commenced." It implies there is a payment to be made at the office, and if it is made to any person in the office, that would be a good payment. But my doubt is, whether there is any authority contained in this letter, to receive anything less than 3*l.* 13*s.* 6*d.*: the tender of this sum is not made. The plaintiff's attorney had, indeed, no right to annex that condition to the payment, and he is not entitled to charge the 6*s.* 8*d.*; but he may give a special authority to receive a particular sum; he may have given a strict authority that a less sum than 3*l.* 13*s.* 6*d.* should not be taken. Then, if you advert to the conclusion, it is to be made by *Wednesday;* and if it had come after, it would have been insufficient. On the whole, I have some doubt of the propriety of the decision of the under-sheriff, and that doubt is not dissipated by what I have heard; but as the rest of the Court are against me, the rule will be discharged. There certainly was an improper attempt made on the part of the attorney, to get the costs of a writ.

BOLLAND, B.—I am of opinion this was a good tender of the amount of the debt. The letter would authorize any person in the office to receive the money; for it is free to the party to whom the representation is made, to believe that, if he should call at the office to pay the money, somebody would be there to receive it; that is implied.

(*a*) 4 Camp. 177.

Exchequer.

KIRTON v. BRAITHWAITE.

GURNEY, B.—I think the tender would not have been good, but for this letter; but having written the letter, the attorney was bound either to have attended himself, or to have authorized a clerk to receive, and to give a receipt for it. A clerk is left in the office, in office-hours, and before twelve o'clock a tender is made. I think the tender is good.

Rule discharged.

BRYANT *v.* CLUTTON.

On the trial of an action of trespass for a false imprisonment, to which Not Guilty and a justification were pleaded; it appeared that the plaintiff had been detained in custody by force of an attachment lodged with the gaoler by the defendant:—*Held*, that the plaintiff ought not to have been nonsuited, but that the detainer by legal process ought to have been proved under a plea of justification.

TRESPASS for assaulting and imprisoning the plaintiff. *Pleas.*—1. Not guilty. 2. A justification under an attachment issued out of the Court of King's Bench, for non-payment of costs. At the trial before Lord *Abinger*, at the sittings in *Middlesex*, after last *Michaelmas* Term, it was in evidence that the plaintiff was brought up to the Court of King's Bench, he being then in the custody of the Marshal, by an order obtained by the defendant, and served upon the gaoler by the defendant's clerk: the defendant was an attorney. He was, on being brought up, committed by the Court of King's Bench on the attachment, and detained in prison. It appearing that the defendant had not interfered further in causing the imprisonment of the plaintiff, Lord *Abinger* was of opinion that no trespass was proved; that, upon the evidence, the imprisonment appeared to be altogether the act of the Court; and the learned judge nonsuited the plaintiff.

Bompas, Serjt. obtained a rule to shew cause why the nonsuit should not be set aside, citing *Bates* v. *Pilling* (*a*).

Platt shewed cause.—It appeared upon the evidence, that the imprisonment was by virtue of process issuing out of a court of competent jurisdiction; and even if the defendant was shewn to have put that process in motion, the remedy would be case for maliciously doing so, and not trespass.

Bompas, Serjt., *contrà*, was stopped by the Court.

PARKE, B.—It seems to me, there ought to be a new trial, and that the ruling of the Lord Chief Baron is not correct. The act complained of is an imprisonment which takes place in the prison of the Court of King's Bench, in consequence of the act of the defendant himself, in lodging an attachment with the marshal; he sets the marshal in motion, that appears to me to be *primâ facie* a trespass; and to call on the defendant to justify that act. The question arose on the general issue.

BOLLAND, B.—I am of the same opinion, and think that the rule in this case should be made absolute for a new trial. It appears that the defendant was the leading cause of the plaintiff's imprisonment, and could not, therefore, under the general issue, shew the imprisonment was the act of the Court. It appears to me there should have been a special plea.

(*a*) 6 B. & C. 38.

ALDERSON, B.—On this plea it is sufficient to shew the party was imprisoned by the act of the defendant, and detained in custody by something he did: probably it will be found the defendant is justified; but that should be shewn. The defendant takes a strip of paper to the gaoler, and he takes the person into custody. You ought to plead, and first to shew that the strip of paper was a sufficient authority.

Lord ABINGER, C. B.—In this case there must be a new trial; but I must say I still retain my opinion, the opinion I have before expressed. The imprisonment which the plaintiff in the cause has sustained, was stated to me, and was taken to be, an act of trespass done to the plaintiff. I consider the marshal to be the officer of the Court in whose custody the plaintiff actually was at the time; and merely serving a person with a writ to keep one whom he has already in his custody, does not make the party who serves it a trespasser. What is a detainer against a person already in custody? The continuance of the detention was the direct act of the Court. I understood that somebody had moved the Court for a rule to shew cause why there should not be an attachment against *Bryant*, he being at that time in custody. I did not consider the rule to shew cause was any act of trespass: then that somebody had served an attachment on the marshal, with a view that he might not discharge him; but before the time expired when he might be discharged, the Court made an order he should be kept on that particular attachment; therefore the detention was the immediate effect of the order of the Court. The Court seem now to be of opinion the mere effect of bringing him up was a new trespass. Suppose the man had been transferred to another court, when the marshal was there, the marshal is for this purpose an officer of this Court under the order of the Court. It appeared to me it was not a renewed custody, or a change of custody: then the detention strikes me to be the only part of which Mr. *Bryant* can complain in this case, and that is the act of the Court itself. On that ground, I differ from the rest of the Court; but, however, of course, there must be a new trial.

Rule absolute.

SIBONI *v.* KIRKMAN and another, Executors of JOSEPH KIRKMAN.

In an action on a contract, by which the defendant admitted a receipt of 40*l.* in part payment of a piano-forte which he undertook to deliver to the plaintiff on his return to *England*, the defendant pleaded that he did deliver a piano-forte, and allow the sum of 40*l.* as part payment thereof:—*Held*, that the lapse of upwards of twenty years from the time of the making of the contract was not a *primâ facie* proof of the plea.

Held also, that the executor of the defendant was liable on the contract.

ASSUMPSIT. The declaration stated that, on the 29th of *October*, 1814, the plaintiff was about to leave *England*, and had delivered a certain instrument, of the value of 40*l.*, to the defendant's testator, who had accepted and taken it in exchange, and thereupon, in consideration that the plaintiff had agreed to purchase of him, on his return to *England*, a grand piano-forte, the testator undertook to sell him such grand piano-forte, and to be accountable to him for the said 40*l.* in part-payment thereof. The declaration averred that the plaintiff returned to *England* after the death of the testator, and offered to purchase a grand piano-forte, and to pay the reasonable price

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thereof, after deducting the said 40*l.* Breach.—That the defendants refused to sell a grand piano-forte to the plaintiff. *Pleas.*—1. That the testator did not promise. 2. That after the making of the promise by the testator, he sold to the plaintiff, and the plaintiff purchased, a grand piano-forte, to wit, of the value of 73*l.*, in consideration and exchange of the said instrument delivered to the testator, of a certain sum of money, to wit, 33*l.*, then paid to the plaintiff; and that the grand piano-forte, bought by the plaintiff, was delivered to him, and had and received by him in satisfaction and discharge of the promise of the testator. Issue joined on a replication traversing the plea.

At the trial before Lord *Abinger*, at the *London* sittings after last *Michaelmas*, the plaintiff gave in evidence the following admission in writing by the testator: "I hereby acknowledge that I am accountable to Signor *Siboni* in the sum of 40*l.* in part payment af a grand piano, which he agrees to purchase of me on his return to *England*, the said sum of 40*l.* being the value of an instrument which I have taken of him in exchange.

"*Broad Street, Oct.* 29, 1814. "*Joseph Kirkman.*"

It appeared that the plaintiff was in *England* in the year 1834; but there was no evidence that he had been before that time. The action was commenced more than twenty years after the date of the agreement. The learned judge directed the jury, that as the plaintiff had not proved that he had not been in *England* before the year 1834, they might, from the lapse of time, presume that the contract had been satisfied. The jury having found a verdict for the defendant, *Cresswell* obtained a rule to shew cause why there should not be a new trial, on the ground of misdirection, the lapse of time raising no presumption of the facts stated in the plea.

Kelly and *Hoggins* shewed cause.—There was no misdirection. The substance of the plea is, that the contract has been performed; and after the lapse of twenty years, the jury ought to be told to presume so; in the same manner as upon a plea of payment, in an action on a bond more than twenty years old. If it is to be assumed, that the plaintiff's return to *England* was a condition precedent to his right to receive a grand piano-forte, there was no evidence that the plaintiff had not been in *England*. But the plaintiff's return to *England* was not a condition precedent: suppose he had never returned, would he not have had a right to the advantage of his contract? or if he had died abroad, would not his executors have been entitled to the benefit of it? [*Parke*, B.—Your argument is, that you might have pleaded the Statute of Limitations.] There might have been a difficulty in doing that, as the contract contemplated a future performance. [*Parke*, B.—Is not this a case in which a special request is necessary, and can such a request be presumed?] If a request be necessary, that may be presumed as well as the delivery. It has been contended, that the plea is a plea of accord and satisfaction: that is not so; it is a plea of performance.

Cresswell and *Martin contrà*.—It was a condition in this contract that the plaintiff should return to *England:* the Statute of Limitations could not begin to run until his return; consequently, if the doctrine of presumption, from lapse of time, is admissible in this case, the computation of time cannot begin

before the plaintiff's return to *England*, and of that there was no evidence. But this plea is not a plea of performance; it is a plea of new matter, alleged by way of accord and satisfaction. It introduced altogether new facts, alleging that the testator delivered a piano-forte to the plaintiff, and that he paid the testator the further sum of 33*l*. The plea is either a plea of performance, and then there is no proof of the plaintiff's return to *England;* or it is a plea of accord and satisfaction, which it was incumbent on the defendant to prove.

Cur. adv. vult.

Lord ABINGER, C. B., on a subsequent day, gave the judgment of the Court, that the rule should be made absolute, on the ground that the question for the jury ought to have been, whether the specific facts alleged in the plea were proved.

SIBONI *v.* KIRKMAN.

THIS case having been tried a second time, cor. *Parke*, B., at the sittings in term, when the same evidence was given, the learned baron directed them to find a verdict for the plaintiff, unless they were of opinion that the special plea was proved. To this ruling the defendant's counsel tendered a bill of exceptions, and the jury found a verdict for the plaintiff.

Kelly now moved in arrest of judgment, to prevent the necessity of going on with the bill of exceptions, and contended that the contract in the declaration was personal to testator alone, and the executors were not liable, not being mentioned in it. [*Parke*, B.—How does it appear it was to be *Kirkman's* piano-forte, or that he was a piano-forte maker?] That is implied. Executors are not bound to carry on the trade of the testator; but if they are to deliver a piano-forte under this contract, they would either have to make or to purchase one; they would have to trade, and would make themselves liable to the bankrupt laws, as it has been held executors are subject, although they do not carry on the trade for their own benefit (*a*). [*Parke*, B.—The executors are not bound to carry on the trade; all they are required to do is, to deliver one of *Kirkman's* pianos. There is a case in 3 Bulstr. (*b*) where it was held that the executors of a man, who had covenanted to build a house, were bound to go on with it; and *Marshall* v. *Broadhurst* (*c*) is the converse of that case.] [*Abinger*, C. B.—I think you might make this point—are the executors bound to retain a sum of money till the plaintiff chooses to return to *England?*] There must be something express in the contract, to oblige the executors to do so. If the executors are bound, for how long are they bound? till the death of the plaintiff, or might his executors claim? [*Parke*, B.—There is no greater difficulty here than in other cases, where the testator has entered into covenants. Not harder, for instance, than the case where the

(*a*) See *Viner* v. *Cadell*, 3 Esp. 88.
(*b*) *Quick* v. *Ludbarrow*, 3 Bulstr. 30.
(*c*) 1 C. & T. 406.

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executor was held bound to take an apprentice. (* ?) Suppose the testator had covenanted to indemnify for fifty years ?] No doubt, whatever he had covenanted for, he must do; but the question is, whether the executors are bound. This is submitted to be a purely personal contract, like that of an author to supply literary matter, or of a painter to paint a picture. [*Parke*, B.—We cannot take any notice on this record, that the defendant is not a broker or a merchant.]

Lord ABINGER, C. B.—If I am called upon to pronounce judgment, I should think that judgment cannot be arrested. I think you must be left to your writ of error.

Rule refused.

PORTER *v.* IZAT.

A plea traversing the damage only is bad. In an action on a contract that a ship should sail from *Hamburgh*, being tight, staunch, and strong, and proceed to *Lima*, the declaration alleged, by way of breach, that the ship, when she sailed, was not tight, staunch, and strong, and that though she did sail from *Hamburgh*, yet, by reason of her not being tight, &c., she was obliged to put back to *Altona*, and was by reason hereof detained at *Altona* a long space of time. *Held* that a plea was bad, traversing that the detention at *Altona* was caused by the vessel not being tight, staunch, and strong.

ASSUMPSIT on a charter-party, dated 24th *September*, 1833, on the ship *Margaret Thompson*, whereby it was agreed that the said ship, then lying in the port of *Hamburgh*, and being tight, staunch, and strong, and every way fitted for the voyage, should, in the course of *November*, then next, set sail and proceed to *Valparaiso*, the intermediate ports, and *Lima*, and having discharged her outward cargo should forthwith be made ready and proceed to *Costa Rica* and there receive and take on board a full cargo of wood or other lawful produce, &c., and being so loaded should therewith proceed to *Liverpool*, and there deliver the same agreeably to the bills of lading, and so end the voyage, &c. The declaration alleged the following breaches; that the vessel did not, in the course of the said month of *November*, set sail or proceed on her said voyage; that she was not in the said month of *November*, or at any time afterwards, until she sailed on the said voyage, nor was she when she so sailed, to wit, on the 20th of *December*, 1833, tight, staunch, or strong, or in any way fitted for the said voyage; and that, although she did, to wit, on the day and year last aforesaid, sail and proceed on the said voyage, to wit, from the port of *Hamburgh* aforesaid, yet, by reason of her not being tight, staunch, strong, and fitted for the voyage, as aforesaid, when she so sailed, she was afterwards, to wit, on the day and year aforesaid, obliged to be put back, and did put back to *Altona*, and was by reason thereof detained there for a long time, to wit, until the 30th of *January*, 1834; and although she did, to wit, on the day and year last aforesaid, again set sail, and depart on her said voyage, to wit, from *Altona* aforesaid, yet she did not proceed on the said voyage, in and according to the due course thereof, nor with the despatch which she ought to have used according to the said charter-party. But after her said departure from *Altona*, and before her arrival at *Lima* she was, by and through her master and mariners, and by and through other the servants of the defendant, greatly delayed on her said voyage, and unnecessarily and improperly deviated from the same, and from and out of the course thereof, and went to divers other ports and places not in the course of the said voyage, and for purposes other than the purposes of the said voyage. By means of which said several premises the plaintiff saith, that the said vessel did not arrive at the port of *Lima* aforesaid, until the

11th day of *September*, 1834, and the plaintiff was hindered and prevented from loading and shipping on and by the said vessel, a certain cargo, and divers great quantities of goods, &c., from *Costa Rica* aforesaid, and lost the benefit of a certain other charter-party, which he had entered into while she was expected to arrive there in a reasonable time, and which was to be void if she did not arrive at the port of *Lima* by the 30th of *June*, 1834, &c.

The defendant pleaded, fourthly, as to so much of the declaration as related to the vessel not being fitted for the voyage, and by reason thereof being obliged to put back and go to *Altona*, and being detained there for a short time, that is to say, such time as was necessary and required to put a further quantity of ballast on board, payment into court of 1*s*., with an averment that the plaintiff had not sustained damages to a greater amount, in respect of the cause of action in that plea mentioned. Fifthly, as to so much of the declaration as related to the vessel being detained at *Altona* beyond the time necessary and required to put the said ballast on board; that she was not detained there, by reason of her not being tight, staunch, and strong, and every way fitted for the said voyage, in manner and form, &c. Concluding to the country. And the sixth and seventh pleas denied the delay and deviation alleged to have taken place after the departure of the vessel from *Altona*.

The plaintiff took issue on all the pleas, except the fifth, and demurred specially to that plea, assigning the following causes, amongst others; that the defendant, in and by the said fifth plea, denies and traverses matter which is not traversable, and which is only special damage, and that he also traverses and denies what is not alleged in the declaration, namely, the fact of the said vessel being detained at *Altona* beyond the time necessary and required to put the said ballast on board, by reason of her not being tight, staunch, and strong, and every way fitted for the voyage, and that the plea admits the breach alleged in the declaration as to the ship not being tight.

Crompton, in support of the demurrer.—The plea attempts to traverse the statement of damage in the declaration. The detention at *Altona* is not alleged as a breach of the contract, but as a special damage resulting from the breach. In trespass, a traverse of that which comes after the *ita quod*, is bad (*a*). In *Smith* v. *Thomas* (*b*), *Tindal*, C. J. said, "the plea must be in answer to the action; there is no such thing as a plea to the damages." The plea is also bad, as traversing that which is not alleged. The declaration does not state that the vessel was detained at *Altona* by reason of her not being tight, staunch, and strong, but by reason of her being obliged to put back in consequence of not being tight, and staunch, and strong. (He was then stopped by the Court.)

Martin, in support of the plea.—The breach of the contract alleged in the declaration, to which the plea applies, is not that the ship was not staunch and strong, but that she did not duly proceed on her voyage. This is a distinct breach. The allegation of damage is at the end of the declaration in the ordinary form. [Lord *Abinger*.—The proper plan would be to pay a sum into court to the whole breach.] [*Parke*, B.—The next breach shows that the

(*a*) Com. Dig. *Pleader*, G. 12. (*b*) Bing. N. C. 372; S. C. Hodges, 353.

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former allegation was not intended to state a breach in not duly proceeding on the voyage. But even in the way you put it, you do not avoid the breach; you avoid the question in the ordinary sense of the term. It does not appear to me to be a breach at all, but a mere consequence of the breach previously stated.]

The defendant had leave to amend on payment of costs.

WHIPPLE *v.* MANLEY.

The record is conclusive evidence of the time of the issuing of the writ; but if a wrong date has been inserted, the trial may be set aside, and the record altered.

ASSUMPSIT for goods sold and delivered. *Plea*—A tender. *Replication*—A writ issued before the tender. At the trial before the under-sheriff of *Devonshire*, the defendant proved a tender on the 11th *December*. On reference to the writ of trial it appeared that the writ was issued on the 24th *November*. The defendant offered evidence to shew that there had been two writs, the latter of which, issued on the 26th of *December*, was the commencement of the suit. The under-sheriff rejected the evidence, as contradictory to the statement on the record.

J. Greenwood, in *Hilary* Term, moved for a rule to shew cause why there should not be a new trial, on the ground that the evidence was improperly rejected. *Lester* v. *Jenkins* (*a*), decides that it is competent to the defendant to prove by parol evidence, the real commencement of the action. [*Parke*, B.—That was in an action commenced before the rules H. T. 4 W. 4.; they require the true date of the issuing of the writ to be stated on the record.] [Lord *Abinger*.—You may take a rule to shew cause why the writ of trial should not be amended by inserting the true day on which the writ was issued.]

Wightman shewed cause on an affidavit stating that there had been but one writ, which was regularly issued against the defendant, by the name of *Richard Manley*, and that the same writ was afterwards altered, and resealed on the 19th *December*. The issuing of the writ where there has been a re-sealing relates to the original issuing of it, and not to the re-sealing. *Braithwaite* v. *Lord Montford*. [*Parke*, B.—That would do a great injustice to the defendant.] [*Alderson*, B.—The resealing was done behind the back of the defendant.] At all events the defendant ought to have applied sooner to set it aside; it is too late after the cause has been tried.

Greenwood, in support of the rule, cited *Miller* v. *Miller* (*b*), and *Glenn* v. *Wilks* (*c*), as deciding, that where the writ has been resealed, and reserved, the resealing is to be taken as the issuing of it.

Per Curiam.—The Court were clearly of opinion, when the rule was granted, that the date on the record is conclusive proof of the time of the issuing of

(*a*) 8 B. & C. 539.
(*b*) 4 Dowl. P. C. 322.
(*c*) 2 Bing. N. C. 66; S. C. 1 Hodges, 135.

the writ; but if a wrong date is improperly inserted the writ may be set aside and the record altered. There must be a new trial unless the parties will consent to a *stet processus*.

The parties agreed to a *stet processus*.

WHITE *v.* BARRACK and another.

DEBT on a bail-bond by the assignee of the sheriff. The plea traversed the assignment. At the trial, before *Alderson*, B., it appeared that the assignment was executed in the presence of, and attested by, the plaintiff and another person. It was objected that, as the 4 Anne, c. 16, s. 20, required the sheriff, or other officer, to assign, by indorsing the bail-bond, and "attesting it under his hand and seal, in the presence of two or more credible persons," it was necessary that the assignment should be in the presence of persons competent to be witnesses of it. The learned judge expressed a strong opinion in favour of the objection, but directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit. Plaintiff having obtained a rule accordingly,

An assignment of a bail bond by the sheriff must be in the presence of two persons, other than the the sheriff and the plaintiff.

Busby shewed cause.—The act of the sheriff constitutes the assignment, and an attestation as altogether unnecessary. The legislature in adopting the word "credible," must be taken to have used it in a different sense to "competent;" the plaintiff, on an application to the Court, would have been a credible witness of the act of the sheriff.

Per Curiam.—The statute clearly means that the assignment shall be in the presence of two persons, neither of them the assignee or the assignor.

Rule absolute.

ALEXANDER *v.* VANE.

ASSUMPSIT for the value of the keep of certain horses, &c., and for money paid, and on an account stated. *Plea*—Payment into court of 33*l*. Issue on joined on the question of damages *ultra* that sum. At the trial before *Gurney*, B., at the sittings in *Middlesex*, after last *Michaelmas* Term, the point litigated was the defendant's liability to repay to the plaintiff the sum of 30*l*. 10*s*. which he had paid to one *Palliser* on the defendant's account. It appeared that the defendant, being in want of harness, went with the plaintiff to a person named *Palliser*, a harness-maker; *Palliser* supplied the defendant with harness, on receiving a verbal guarantee from the plaintiff that he would pay for the harness if the defendant did not. The debt thus contracted remaining unpaid, at the request of the plaintiff, *Palliser* issued an attachment on the defendant's horses in *London*. To obtain a release from the attachment, two post-dated cheques were delivered by the defendant to the plaintiff, who handed them over to *Palliser*, and the attachment was withdrawn. On the 20th *Oc-*

A party who has, at the time a debt is contracted, given a verbal guarantee in the presence of the debtor, has an authority from him to pay the debt, and, having done so, may recover the amount as money paid to his use. *Dict. aliter*, if there was not evidence that the verbal guarantee was given with the debtor's consent.

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tober, the plaintiff wrote to the defendant, "Will you permit me to pay Mr. *Palliser* the balance due to him, after deducting the head-stalls you sent back, as he and I have continual words about my releasing your horses from the attachment? Say per bearer if I shall pay him." It did not appear whether any answer had been given to this letter. The defendant had previously paid a part of the demand, and the plaintiff then paid the balance due, amounting to 30*l.* 10*s.* The cheques were returned to the defendant. The plaintiff had a verdict for 30*l.* 10*s.*, subject to leave given to the defendant to move to enter a nonsuit, on the ground that the plaintiff, as the guarantee was not in writing, was under no legal obligation to pay *Palliser*, and had consequently no authority from the defendant to pay him. *Thesiger* obtained a rule accordingly; against which,

Platt and *Humfrey* shewed cause. The defendant was present when the guarantee was given; when the plaintiff said to *Palliser*, "I will pay you if the defendant does not," and he must be taken to have given an authority in fact to the plaintiff to pay him; and it does not appear that that authority has ever been revoked.

Raines, contrà. It is perfectly clear, upon the evidence, that the defendant was the party liable to *Palliser;* consequently, as there was no note in writing, the payment by the plaintiff to him does not fall within the rule, that a payment by a party liable to the compulsion of law, is a payment to the use of the party. If, indeed, the presence of the defendant, at the time the verbal guarantee was given, could be considered as giving an authority to the plaintiff, the letter of the plaintiff to the defendant is evidence to shew that it had been revoked.

Lord ABINGER, C. B.—It appears to me that this rule cannot be supported. There is some complexity in the facts relating to the attachment; but nothing turns upon that; the question is upon the authority given to *Alexander* to pay the money. It is true, the plaintiff was under no obligation in law to pay *Palliser;* but he had entered into an engagement which he was bound in honour to perform, and that engagement was made in the presence and with the sanction of the defendant. The important fact is, that it was made in his presence; that, I think, raises the inference that it was made with his authority. If then there was an original authority, does anything appear to shew a revocation of it? I think not. All the circumstances are consistent with a recognition of the plaintiff's authority to pay; the cheques are given to him by the defendant; if he had then paid *Palliser*, and kept the cheques, can it be doubted, if they had been dishonoured, that he could have brought an action for money paid to the defendant's use? Then if there had been an arrangement when the horses were released from the attachment, amounting to a satisfaction of the debt, a subsequent payment by the plaintiff would have been in his own wrong; but the evidence is merely that the defendant obtained the indulgence of further time to pay the debt. After the expiration of that time, *Palliser* desires the plaintiff to pay the money; and the plaintiff desired, for his further security, to have a written authority to pay the money; but if the defendant meant to put an end to the plaintiff's authority to pay it, he should have written in reply, directing him not to do so.

PARKE, B.—I am entirely of the same opinion. I think, upon the facts of the case, when clearly understood, there is no difficulty in law. (The learned judge stated the facts.) The whole case turns upon the fact that the plaintiff's conditional promise was made in the presence of the defendant; if it had not been so made, and the plaintiff had paid, it would have been without authority, and the plaintiff could not have recovered it as money paid to the defendant's use; but as the fact is, I think it must be taken to be an assent by the defendant that the plaintiff should pay on his account, if he did not himself pay the debt. Then the question is, has the authority so given been countermanded? I think the facts connected with the release of the attachment tend to show that the authority originally given still continued. Nor does it appear to me that the letter, written by the defendant, raises any implication of a countermand; if such a meaning is sought to be put on it, the defendant's counsel ought to have asked to have it left to the jury to say whether it bore that meaning; we are not now at liberty to say that the jury would have drawn that inference. I should myself have considered only, that the plaintiff required a certain authority as a greater security.

BOLLAND, B.—It appears to me, the only question is, whether there is any engagement on the part of *Vane*, either implied or expressed, to authorize *Alexander* to pay this debt. If *Vane* had not been present at the time this bargain took place, there can be no doubt at all but that he would have a good answer to the claim of *Alexander;* but as it must be taken the witness has spoken the truth, in stating that *Vane* was present, it is, on the part of *Vane*, an agreement that *Alexander* should pay the debt if he, *Vane*, did not. Then, as no answer whatever was given to the letter written by *Alexander* to *Vane* on the day on which the payment was made,—and it is to be observed, that the letter may have been written by the plaintiff to get some written authority to pay the debt, and also to know whether or not he had paid the amount of the bills due for the horses; then, with regard to the attachment, and the other parts of the case, they do not appear, as between these parties, at all to affect the question. If *Palliser* had sued *Alexander*, *Alexander* might then have set up the attachment in answer to the claim, and he might have said, "Whatever my liability was, either upon one ground or another, even if I had given a guarantee in writing, which I could not have protected myself from by the Statute of Frauds, still you have released me by attaching the property of *Vane*, which you might have made available to yourself, and which power you have given up in relinquishing the attachment." Now, on that ground, it could be no answer in *Vane*'s mouth, although it might have been in *Alexander*'s. Then, as to time, he is on the same footing, if *Alexander* is to pay. Whatever time was given to *Vane*, he must have ultimately been liable to pay either *Palliser* or the plaintiff. Nothing has occurred to waive the agreement which he consented to at the time it took place.

GURNEY, B.—I am of the same opinion. The evidence of *Palliser*'s clerk was, "*Alexander* said, in the presence of the defendant, 'If Mr. *Vane* did not pay for the articles, he would.'"

Rule discharged.

Exchequer.

BAYLEY *v.* REINNELL.

In an action for work and labour, the plaintiff proved a service of 161 days. The particulars of demand claimed payment "at the rate of 200*l.* a-year." Payment had been made in different sums and at various periods. At the expiration of the 161 days, the plaintiff left the defendant's service. It did not appear that he had offered or had been requested to return. The plaintiff had a verdict. *Semble*, that here was no evidence of a hiring at all, or that, if there was, the evidence raised a presumption that the hiring was not for a year; and *held*, that, in the absence of a finding by a jury, that there was a yearly contract, that the Court ought not to grant a new trial, on the ground that there appeared to be an unperformed contract for a time certain.

ASSUMPSIT for work and labour. The defendant pleaded non-assumpsit, and that the plaintiff had not served the period for which he had contracted.

At the trial before *Gurney*, B., the evidence was, that the plaintiff had served the defendant in the capacity of an assistant-surgeon during 161 days, for which he was to be paid at the rate of 200*l.* per annum. In the particulars of demand, the claim was also stated to be for a service for that time at that rate. Payments had been made at several, but at indefinite periods, and in unequal sums. It further appeared that, at the expiration of that time, the plaintiff was taken ill, and left defendant's service. It did not appear that there had been any offer to return by the plaintiff, or demand that he should do so by the defendant. It was urged that there was evidence for a hiring, for a year, and that the service not being completed, the plaintiff was not entitled to recover anything. The learned judge over-ruled the objection, and the plaintiff had a verdict.

Theobald now renewed the objection on a motion for a new trial, on the ground of misdirection (*a*). (A rule was also moved for, to reduce the damages. This part of the rule was granted.) A general hiring is in itself *primâ facie* evidence of a hiring for a year; and in this case, the particulars of demand, and the evidence, claimed a payment at the rate of 200*l.* per annum; which shews that a yearly contract was contemplated by the parties. The general principle cannot be disputed, that if there be a contract for a specific time, and it is not performed, a party cannot recover in *indebitatus assumpsit*. — *The Countess of Plymouth* v. *Throgmorton* (*a*); *Grimman* v. *Legge* (*b*). Nor can a servant in any form recover for a service during a part of the time, unless the misconduct or assent of his master have put an end to the contract. —*Thomas* v. *Williams* (*c*); *Beeston* v. *Collyer* (*d*); *Ridgway* v. *The Hungerford Market Company* (*e*); and *Turner* v. *Robinson* (*f*).

Lord ABINGER, C. B.—I think there was no evidence of a hiring at all. The evidence in the case simply proved a service, and that would entitle the plaintiff to recover a *quantum meruit*.

PARKE, B.—Supposing there to be, in this case, some evidence of hiring, and that general evidence of hiring is presumptive of a hiring for a year, still I think there was sufficient evidence to rebut that presumption. Payments were made, but not in unvaried definite sums, nor at any definite periods. The plaintiff left the defendant's service, and it does not appear that he offered to return, or was asked to return. If the defendant contends that

(*a*) 1 Salk. 65.
(*b*) 8 B. & C. 324.
(*c*) 1 Adol. & Ell. 685.
(*d*) 4 Bing. 309.
(*e*) 3 Ad. & El. 171; 1 Harr. & Wol. 244.
(*f*) 5 B. & Adol. 789.

the evidence shewed a yearly hiring: he ought to have asked the learned judge to put that question to the jury.

BOLLAND, B., and GURNEY, B., concurred.

Rule refused.

BALLARD *v.* WAY and another.

A vendee of land, on discovering that at the time of the contract of sale, it was and continued liable to be taken, under a private act of Parliament, for the use of a company, is entitled to rescind the contract and to recover back the deposit.

A local act of Parliament, though containing a clause, making it a public act, is not public notice of its powers over land therein mentioned.

A simple sale of land implies a covenant that the vendor has a good title to the land, but it does not support a count, stating a warranty that he had a good title free from all liabilities whatsoever.

ASSUMPSIT. The first count stated specially, that the plaintiff became the purchaser, by auction, of certain property of the defendants, by them put up to sale, and that he paid a deposit thereon. The declaration then alleged, that in consideration of mutual promises to perform all things stipulated in the conditions of sale, a promise and undertaking, by the defendants, that they then had good and sufficient right, title, power, and authority to sell, transfer, and assign, the said property to the plaintiff, free and clear of and from all charges, contracts, incumbrances, and liabilities whatsoever, other than and save and except those stated and set forth in his said description thereof, in the said particulars of sale. After stating the performance, or readiness to perform, by the plaintiff, his part of the contract, the breach alleged was, that the defendants had not, at the time of the said exposure to sale, and sale, and of the making their same promise and undertaking good and sufficient, or any right, title, power, or authority to sell, transfer, and assign, to the plaintiff, the said property, free and clear from all charges, other than, &c. &c., in this, to wit, that five of the said houses, numbered respectively, 113, 114, 115, 116, and 117, long before the said exposure and putting up to sale, had been and were inserted in a certain schedule annexed to a certain act of parliament, made and passed in the 4th year of the reign of his present Majesty, intituled, "An Act for erecting, establishing, and maintaining, a Market in the Parish of St. *George* the *Martyr*, in the Borough of *Southwark*, in the County of *Surrey*," as part of the property which a certain company were authorized by the said act to treat for, purchase, and take. The declaration then alleged, that by reason of that liability of the five houses to be taken by the said company, the plaintiff, if he accepted an assignment thereof, would be prevented from disposing of them so well as he otherwise would do; and that without those five houses the others would be useless to him. The damage alleged was the expense the plaintiff had been put to in investigating the title, and the loss of the money, and use of the money, paid as a deposit. There was also a count for money had and received.

Pleas—first, non assumpsit; secondly, that the property was described in the particulars of sale, and in the schedule annexed to the act of Parliament; that the descriptions corresponded, and that the plaintiff had notice thereof.

The *replication* set out the particulars and description, averring that they did not correspond, and denying that the plaintiff had notice that the houses were liable to be taken under the act of Parliament.

Rejoinder and issue joined on the correspondence of the particulars with the description in the schedule, and on notice to the plaintiff therefrom.

At the trial before Lord *Abinger*, at the sittings in *London*, after last *Hilary*

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BALLARD v. WAY.

Term, it appeared that no express notice had been given by the defendants to the plaintiff that the houses were liable to be taken by the Market Company. Evidence, on the part of the plaintiff, was given, to shew that it would be very difficult to ascertain from the particulars and description in the schedule, that they both comprised the same property; and the question being put to the jury, they found that the two did not correspond. The learned judge was of opinion that the evidence did not support the contract, as stated in the count, and his lordship nonsuited the plaintiff, giving him leave to move to enter a verdict if the Court should be of opinion that the act of Parliament itself, which contained the usual clause, making it a public local act, did not amount to notice to the plaintiff. *Erle* obtained a rule accordingly, against which

Platt and *Barstow* shewed cause.—The evidence does not support the first count: it merely proved an ordinary sale without any express warranty. There may be an undertaking that the party has title to sell, but not an undertaking, as set forth, that the land is free from all liabilities whatsoever. If the first count is not supported the defendants are entitled to retain their nonsuit; for a liability, such as this is, does not authorize the party to rescind the contract. It is, at most, a defect in the estate to which the rule *caveat emptor* applies (*a*). There are few estates in the country not liable to some such liability, under the numerous highway, drainage, or railway acts. The Customs' Management Act, 3 & 4 W. 4, c. 51, s. 35, authorizes the commissioners to take, for the purpose of the act, half an acre of land within half a mile of the sea-shore, or tide way of any navigable river. Want of notice of a footway round a meadow was held by Lord *Rosslyn* not sufficient to invalidate a purchase of the meadows, and specific performance was decreed (*b*.) If, however, the liability is held in itself a sufficient defect, the plaintiff must be taken to have had notice. The Market Act contained the usual clause, making it a public act, and it is notice to all the world of the contents of it.

Erle, Sir *W. W. Follett*, and *Petersdorff*, in support of the rule.—The general warranty of title, which is implied from the mere fact of a sale, is as extensive as the contract stated in the first count of the declaration. The contract the defendants entered into they had not the power to fulfil; the case is the same as if the defendants, before selling the houses to the plaintiff, had entered into a contract of sale of them to another party; a local act operates upon the property which it affects like a private conveyance. There are many similar liabilities, which have been held to be such defects in the title, as to prevent the vendor having a right to compel the vendee to take the estate; as where an act of bankruptcy has been committed, because it is impossible to ascertain that there is not such a debt as would support a commission.—*Lowe* v. *Lush* (*c*); *Cann* v. *Cann* (*d*). The principle of these

(*a*) 1 Sudg. Vend. and Purch. 307, 9th edit.

(*b*) *Oldfield* v. *Round*, 5 Ves. 508, cited in 1 Sugd. 307.

(*c*) 14 Vesey, 547.

(*d*) 1 Sim. & Stuart, 288.

decisions is also recognised in *Cave* v. *Baldwin* (*e*); *Barnwell* v. *Harris* (*f*), and *Welch* v. *Fort* (*g*). And a condition that the vendor shall not be called upon to produce his title, does not prevent the purchaser shewing such a defect.—*Shepherd* v. *Keatley* (*h*); *Flight* v. *Booth* (*i*). The words, "all charges, contracts, incumbrances, and liabilities," must mean only such as their property was subject to: those words could only apply to an obligation which affected equally all the land in the kingdom. The act of Parliament is not a notice of the liability to the plaintiff. The clause making it a public act affects only the rules of evidence as to the proof of the act itself, but does not make the statements of the facts in it evidence.—*Brett* v. *Beales* (*k*); *Woodward* v. *Cotton* (*l*); *Bennett* v. *Mountain* (*m*). [Lord *Abinger*.—The Court is strongly impressed with the opinion, that the plaintiff had a right to rescind the contract; the plaintiff did not bargain for a right to compensation.]

Cur. adv. vult.

Lord ABINGER, C. B.—The Court are of opinion that the word "liability," in the first count of the declaration, must extend to a liability of every kind, and therefore a more extensive undertaking for title is stated than is supported by the evidence. The defendant must have a verdict on the first count; but the Court also think that the plaintiff was entitled to rescind the contract and recover the deposit.

PARKE, B.—This is an incumbrance created by a private act of Parliament, to which the defendants' testator must be considered to have been a party; it is quite impossible to say that the defendants have a good title to their land under a liability, which places it in much the same situation as if there had been a previous sale of it. The first count states the undertaking too largely, and, on that, therefore, there must be a verdict for the defendants, on the plea of the general issue; but the verdict must be entered for the plaintiff on the pleadings raising an issue on the notice. The plaintiff will have a verdict on the count for money had and received for the amount of the deposit.

Rule accordingly.

(*e*) 1 Stark. 65.
(*f*) 1 Taunt. 430.
(*g*) 4 Taunt 334.
(*h*) 1 Cr. M. & R. 117.
(*i*) 1 Bing. N. C. 370.
(*k*) M. & M. 421.
(*l*) 1 C. M. & R. 44.
(*m*) 10 Bing. 404.

LANGLEY *v.* the Earl of OXFORD.

DEBT on bond. After the bond and condition had been set out on oyer, the defendant pleaded that the condition had been altered after it was executed; issue was taken on the plea. The case had been tried before, when, the issue then being on a plea of *non est factum* only, previous to that trial a judge's order for the admission of the hand-writing of the attesting witness had been made, which was used at the trial. Upon the present trial, which

Held, that, on a new trial, an admission of the hand-writing of an attesting witness was available, though made before the previous trial, and though in debt on bond, the plea on the former trial was *non est factum*, and on the second trial a special plea that the condition of the bond had been altered after execution.

Exchequer. CASTLEY v. DART & Others.

was a new trial of the same case, the pleadings having been altered into the form above stated, sufficient evidence having been given of a fruitless search for the attesting witness, the plaintiff put in the judge's order to prove his hand-writing. It was objected that the pleadings having been altered, the order for admission, made before the former trial, became inoperative. Lord *Abinger* overruled the objection, and the plaintiff had a verdict.

Sir *W. W. Follett* renewed the objection, on a motion for a new trial, admitting that, if the pleadings had not been altered, the submission would have been available on the second trial.—*Elton* v. *Larkins* (*a*); *Doe dem. Wetherell* v. *Bird* (*b*).

Per Curiam.—The order was for an admission of that fact upon the trial, whenever it took place; the alteration of the pleadings did not affect the proof of that fact.

Rule refused.

(*a*) 5 C. & P. 385; 1 M. & R. 196. (*b*) 7 C. & P. 6.

GUTSOLE v. MATHERS.

In case for slander of title, a declaration not setting forth the words is bad, after verdict, and the Court will arrest the judgment.

CASE. The first count of the declaration stated, that the plaintiff, before and at the time of the committing of the grievances by the defendant, as thereinafter mentioned, was lawfully possessed of divers large quantities, to wit, 20,000 tulips, then being the property of the plaintiff, and being of great value, to wit, of the value of 10,000*l.*; and he, the plaintiff, was then desirous of selling and disposing of the same by public auction, and for that purpose had issued hand-bills announcing that they would be exposed to sale by public auction, at No. 58, *St. George's-street, Canterbury*, on *Wednesday*, the 20th day of *May*, 1835; yet, the defendant, well knowing the premises, but contriving, and falsely and fraudulently intending, to injure the plaintiff, and to cause it to be suspected and believed that the said tulips had been, and were stolen from one *John Mathers*, the brother of the defendant, and to hinder and prevent the plaintiff from selling and disposing of the same, and to cause and procure the plaintiff to sustain and be put to divers great expenses, attending the said exposures to sale of his said tulips, and so vex, harass, and ruin the plaintiff theretofore, and before the exposure to sale of the said tulips, as thereinafter mentioned, to wit, on the 15th of *May*, 1835, wrongfully, injuriously, falsely, and maliciously, asserted and represented, in the presence and hearing of divers good and worthy subjects of the realm, that the said tulips were stolen property. The second count stated, that the defendant afterwards, and before the exposure to sale of the said tulips, to wit, on the 20th *May*, in the year aforesaid, wrongfully, &c., asserted and represented, in the presence and hearing of H. P., T. Y., W. Y., and divers other good and worthy subjects, &c., of and concerning the said tulips of the plaintiff, so there about to be exposed to sale by public auction, as aforesaid, that the said tulips were the property of the defendant's brother, and that whoever bought the said tulips would buy stolen property, (thereby then and there meaning that the said tulips of the plaintiff were the property of the said *John Mathers*, the

brother of the defendant, and had been stolen from the said *John Mathers*.) The declaration then alleged that, on the 20th *May*, aforesaid, the tulips were put up to sale, but that by means of the committing of the grievances by the defendant, divers persons who were present at the sale, and who were about to become purchasers of great part of the said tulips, and would otherwise have bid for and purchased them, particularly the said H. P., T. Y., and W. Y., were deterred and prevented from bidding, and declined to purchase the same, or any part thereof, *per quod*, &c.

Pleas—first, not guilty; secondly, that the plaintiff was not lawfully possessed of the tulips. Issue joined thereon, and verdict for the plaintiff, with one shilling damages.

Erskine Perry obtained a rule to shew cause why the judgment should not be arrested, on the ground that the declaration was bad, in omitting to state the words in which the slander was conveyed.

Andrews, Serjt., and *George*, shewed cause.—If this were an action of slander, the words ought to have been set out; *Cook* v. *Cox* (*a*); but it is not an action of slander; it is an action for a special damage sustained by the plaintiff in consequence of the act of the defendant. In slander of title, defendant may give evidence on the general issue, justifying the words.—*Watson* v. *Reynolds* (*b*); *Smith* v. *Spooner* (*c*). In *Blizard* v. *Kelly* (*d*), it was held sufficient, after verdict, that the declaration alleged, "that the defendant imposed upon him the crime of felony." If it were a case of slander of title, the plaintiff must prove malice. [*Parke*, B.—That is only where the slander is made in a claim of title by the defendant himself. The case in 3 Taunt. is not, properly speaking, an action for slander of title, but for making a claim of title without probable cause.] The stat. 21 Jac. 1. c. 16. s. 6. depriving the plaintiff of costs, where, in actions "for slanderous words," he does not recover 40*s*., does not apply in actions for words actionable only when causing special damage; that shews that the damages are the gist of the action, and not the words. To shew the necessity of setting out the words, it is objected that the words, if set out, might appear to be actionable in themselves, and therefore the plaintiff would not be entitled to costs as the verdict is under 40*s*., but if the words were as suggested, the plaintiff ought to have been nonsuited; after verdict for the plaintiff it ought not to be assumed that they were actionable words. The case is analagous to an action for deceit, on which it has never been held necessary to set out the words.

The objection, if well founded when taken on demurrer, is cured by verdict. [Lord *Abinger*.—*Cook* v. *Cox*, (*e*) decides, that when it is necessary to set out the words, an omission to do so is fatal even after verdict: the Court will not be disposed to overrule that case.]

(*a*) 3 M. & S. 110.
(*b*) M. & M. 1.
(*c*) 3 Taunt. 246.
(*d*) 2 B. & C. 283. The declaration charged, that maliciously, and without reasonable or probable cause, the defendant imposed upon the plaintiff the crime of felony; and the judgment of the Court proceeds upon the ground, that to support this count, it would not be sufficient to prove words spoken in conversation, but that it must be shewn there was a charge of felony made before a magistrate.
(*e*) 3 M. & S. 110.

Exchequer.

GUTSOLE v. MATHERS.

Platt and *E. Perry, contrà.*—In an action for slander of property, as well as for slander of the person, it is necessary to set out the words: the case does not, as is contended, resemble that of an action for a deceit; in that case the defendant might, under a plea of not guilty, shew that there was no deceit, by proving the words to be true; in slander of title, under that plea, the truth of the words spoken could not be given in evidence. Nor is this case like that of *Blizard* v. *Kelly* (*f*); there the declaration alleged, and it would be for the plaintiff to prove, that the charge against him was made without reasonable or probable cause: in this action it would be sufficient to prove the words and the damage, and it would be for the defendant to justify, if he could.

The words ought to be set out, to shew the Court that the defendant does not claim title in himself; if he did, an action of slander of title would not lie. *Gerrard* v. *Dickenson* (*g*); so also it must appear that the plaintiff's title was directly impeached. *Crush* v. *Crush* (*h*). In actions for deceit, the slanderous words are not the gist of the action; but in an action for slander of title, the words, and not the damage, are: otherwise, an action would lie where the plaintiff had sustained damage in consequence of a claim of title *bonâ fide* made by the defendant himself. Upon the words, if set out, it might have appeared that a charge that they were stolen might not have impeached the plaintiff's title. And the plaintiff, in actions for a trifling slander, might, by omitting the words and proceeding for the damage sustained, deprive the defendant of the benefit of the stat. 21 Jac. 1. c. 16. which restricts the plaintiff's right to costs to cases in which he recovers a verdict to the amount of forty shillings. So it ought to appear that the damage results solely from the slander. *Vicars* v. *Wilcocks* (*i*). The case of slander of title differs in no respect from that of an action for words not actionable alone. The old entries in *Coke, Lilly,* and *Rostall,* set out the words; the cases collected in Com. Dig. (*k*) state words, which they could not have done, unless the words appeared on the record; and the same practice seems to have prevailed in modern cases. *Pitt* v. *Donovan* (*l*).

Cur. adv. vult.

Lord ABINGER delivered the judgment of the Court.—This was a case argued a few days ago, on a motion in arrest of judgment after verdict. The action is for slandering the plaintiff's title; and the objection is on the declaration, in its setting forth only the effect of the words said to have been spoken by the defendant; namely, that the tulips were stolen property: and in another count, that they belonged to another person, and not to the plaintiff; whereas it is necessary, that the words spoken, if the slander be by words, or if by sign, then the particular sign should be set forth precisely with the proper innuendoes on the record, that the Court may see there is a charge on the defendant which he is bound to answer. It is said that the general rule which requires the words or signs to be specified, is applicable to those cases only in which the action is, properly speaking, for slander, where there has been the use of some term or other matter affecting the personal character, office, or occupation, of the plaintiff, but that it does not apply itself to a case like

(*f*) 2 B. & C. 283.
(*g*) Cro. Eliz. 196.
(*h*) Yelv. 80.
(*i*) 8 East, 1.
(*k*) Action on the Case for Defamation, D. 30.
(*l*) 1 M. & S. 639.

the present, where special damages are made the ground of the action. In looking into the cases that were cited, and the cases generally, we cannot find any authority for this distinction. In the case of *Nelson* v. *Dixie* (*m*), decided in the time of Lord *Hardwicke*, the words were in themselves actionable. In the report of that case, Lord *Hardwicke* is stated to have said, at *nisi prius*, that the declaration would have been sufficient, if the substance and effect of the words had been set out; but he is corrected by Lord *Ellenboorough*, in the case of *Cook* v. *Cox*, who says the dictum of Lord *Hardwicke* was merely thrown out at *nisi prius*, and was evidently founded on a mistake, as there are no such precedents to be found in *Rastall's* Entries as those which he was supposed to have referred to. The case of *Nelson* v. *Dixie*, if deserving of any authority, is overruled by that of *Cook* v. *Cox*, and it is not supported by any other case. In the case of *Cook* v. *Cox*, the judgment of the Court was delivered after much consideration, and that case appears to us a sufficient authority in support of the present motion, although special damage is alone the ground of action. But we think there is no difference in principle in either class of cases. If it were sufficient to state merely the effect of the words, any person would be at liberty to swear as to the effect of the words, without stating any precise words; and even if the witness did state precise words, the jury would have to judge of their legal effect, whereas that is generally to be decided by the Court. Words innocent in themselves might, by the witness, be perverted from their true meaning, or be by the jury so interpreted as to make a defendant clearly liable at law. It is not expedient to blend questions of law and fact together; the most useful object of all systems of pleading is to separate them; it ought, therefore, to appear to the Court upon the face of the declaration, by the words or signs themselves, that they are sufficient to support such innuendoes or averments as may be necessary to apply to the subject, that they may bear the interpretation put on them, and present the injury which is charged to have resulted from them. We think it proper, for these reasons, to adhere to the general rule, by ordering an arrest of the judgment. There may be a class of cases where words are mixed up with the charge, to which this rule could not apply, as in the ordinary case of an action for deceit by reason of a false representation of character; or where an action is founded on a deceitful representation to induce a party to advance his money; that is not properly an action for words. So also, where a man defeats the object of another, by claiming goods that do not belong to him, and does that falsely and maliciously, in such a case it must be alleged that he did claim them as his own, and thereby defeated the plaintiff's object in respect of them; but the mere form of the words is not important. There the complaint is for an act done; this is for an injury resulting merely from certain words, namely, a representation that the plaintiff came by the tulips in an improper manner. We think the words ought to be set forth in the declaration, though, properly speaking, the action is for damages resulting from the false speaking. No precedent is found in any case of this sort, where the words have not been set out. The rule will therefore be absolute for an arrest of judgment.

Rule absolute.

(*m*) Ca. temp. Hardwicke, 305.

Exchequer.

SYBRAY v. WHITE.

In an action for insecurely keeping a mining shaft, issue was joined on the defendant's possession of the shaft. The defendant had stated, that if a miner's jury should say it was his, he would remunerate the plaintiff. The miner's jury gave their verdict in writing, that the shaft was in the possession of the defendant. *Held*, that the finding was admissible in evidence, on the principle on which admissions made by a third person to whom a party refers are admissible.

Held, that as the instrument did not, on the face of it, purport to be an award, an award-stamp was unnecessary.

CASE. The declaration stated the plaintiff was possessed of a certain close, called, &c., and of a mine of great value, to wit, &c., which was depasturing in the said close; and that the defendant was possessed of a certain lead-mine, called, &c., and of a shaft in the said close, leading and belonging to the said mine, by means whereof he ought to have kept the said shaft well and securely fenced round, to prevent cattle depasturing in the said close from falling into the said shaft; yet that the said defendant suffered and permitted the said shaft to be and remain open, whereby the said mare fell down and was killed.

Pleas.—First, that the defendant was not possessed of the lead-mine; secondly, that he was not bound to keep the shaft covered.

At the trial, before *Gaselee*, J. at the last summer assizes for the county of *Derby*, it was in evidence, that, in the plaintiff's close mentioned in the declaration, there was a shaft leading to a mine which had been stopped up many years. The top of the shaft, however, gave way under his mare, and she was killed. It had been contended, on the part of the plaintiff, that the shaft belonged to a mine which was the property and in the possession of the defendant. The defendant said, if a miner's jury should find that the shaft belonged to him, he would pay the damage. In the wapentake of *Winksworth*, within which the premises were situated, there was a customary court, called the Barmote Court. According to the practice of the court, the jury examined the premises. The proceedings were as follow:—

"Gentlemen of the jury,

"You are requested to look over certain lands in the township of W. and S. called *Ox Close* and *Bear Croft*, and to examine the range of the mines, shafts, veins, and acres of ground, given away for mineral uses. Copies from the bar-master's books will be laid before you, and such other information as required, from which you are requested to declare in writing who are the owners of the aforesaid shafts, veins, &c.; and may the God of all wisdom direct you right.

"JOSEPH SYBRAY."

"*Winksworth Soak and Wapentake.*" We whose names are hereunder written, being five of the grand jury of twenty-four, and being this day summoned to a certain mine, called *Ox Close* and *Bean Croft*, lying and being in the liberty of *Matlock*, and wapentake aforesaid; and that having received a bill from Mr. *J. Sybray*, &c. in answer to the said bill, we have examined the range of the mines, shafts, veins, and meers of ground, as given away *March* 15, 1822, and *September* 23, 1824, by *Francis Hursthouse*, bar-master to *Benjamin White*, and consolidated together as one title, according to the copies produced from the bar-master's book, *Michael Carding*, 24 man. *Anthony Knowles* says, that he remembers houses standing upon a hillock in a bush in the *Bean Croft*, marked with O. C. and L., standing for *Ox Close* and *Lee*

Wood. Mr. *Milner* says their right and title was given away by the bar-master and 24. Mr. *G. Tessington* says, that the first and second gift were consolidated together in one title. Mr. *J. Hursthouse* says, that the gift was consolidated together, as by the last evidence; and it is our opinion that the mines, shafts, veins, and meers of ground lying and being in the *Ox Close* and *Bean Croft*, belonged to *Benjamin White* and partners. As witness our hands,

" WILLIAM WALKER,
" ROBERT SHAW,
" GODFREY TAYLOR,
" JOHN TAYLOR,
" JAMES MARSHALL."

This written finding of the jury was offered in evidence, to shew that the shaft belonged to the defendant; it was objected, that, if any thing, it was an award, and ought to have been stamped as such: the learned judge overruled the objection. Evidence was given to shew that the defendant was not possessed of the shaft, among other evidence, the written verdict of a jury summoned according to the practice of the court, subsequently to the other jury finding that the shaft did not belong to him. The learned judge stated, that he thought the finding of the first jury was conclusive on the defendant, he having expressed his assent to that mode of determining the question; the learned judge gave the jury his opinion to that effect, but he also left the question at large to them, to say to whom the shaft belonged. They found a verdict for the plaintiff, with 15*l.* damages.

Goulburn, Serjt. obtained a rule to shew cause why there should not be a new trial, on the ground that the finding was not admissible in evidence; at all events, not unless stamped as an award; and that if it were, the judge misdirected the jury in treating it as conclusive.

Balguy and *N. R. Clarke* shewed cause. It is contended that this written finding of the jury was an award, but that is not so; it is merely the expression of an opinion of a third party, which the defendant has made evidence by making that third party his agent to give an admission. *Williams* v. *Innes* (*a*), *Daniel* v. *Pitt* (*b*). [*Parke*, B.—The learned judge appears to have left the question at large to the jury.] It was left to the jury, and they have found that the defendant was the owner of the shaft.

Goulburn, Serjt. and *M. D. Hill*, in support of the rule.—The written finding of the jury was inadmissible, on the principle which rejects declarations of third parties. If it was in any respect admissible, it was as an award, of which it has all the incidents. [*Alderson*, B.—There is no recital of a submission; a parol award has all the incidents of an award.] If there were a parol submission, and a written award, it would require a stamp.

PARKE, B.—I am of opinion this rule ought to be discharged. If it had been for a larger sum, so that the defendant would be entitled to a new trial

(*a*) 1 Campb. 364. (*b*) Ib. *in not.*

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upon payment of costs, I should be disposed to concur in giving a rule; for I cannot help saying that, looking at the facts of the case, I have no doubt the defendant was not in possession of the shaft; but we are not at liberty, according to the rules of this court, to grant a new trial, where the sum sought to be recovered is under 20*l.*; and, looking at the report of the learned judge who tried the cause, and taking all the observations made in the summing up, I do not find there was any improper reception of evidence, nor any misdirection by the judge. The first question is, whether on this issue the verdict of the miner's jury was properly received. Two objections were taken to its admissibility; one is, that it was not receivable in evidence of the fact alleged in the declaration, that the shaft down which the mare fell was in the possession of the defendant, so as to make him responsible according to the custom; but I am of opinion the verdict of the jury, coupled with the evidence given as to what the defendant said before and after the verdict, is evidence on this issue, on the principle that, supposing the defendant alone had said that provided a miner's jury was called, and said it was his, he would pay the damage, on the principle of *Daniel* v. *Pitt* (*c*), and *Rust* v. *Palmer* (*d*), deciding that admissions of third persons referred to, would be equivalent to those made by the principal. Therefore, without taking into consideration the concurrence of the plaintiff, the simple fact of the defendant saying he would pay if the jury should say it was his, has precisely the same effect as if he himself had made the admission. The jury stand in the situation of his accredited agents. But beside that, in this case, there is the concurrence of the plaintiff in the same fact, and both parties agree to be bound, and the paper produced as the finding of the jury is in the nature of an award between them. But then it is objected, that finding requires a stamp; but I take it, the principle of the stamp-law is only to put a stamp on those instruments which purport to be of the description mentioned in the schedule of the Stamp Act; this does not, on the face of it, purport to be an award. So if two persons agree to refer a case for the opinion of counsel, and to be bound by his opinion, but that opinion does not require an award stamp, if it has not on the face of it evidence of an agreement. So an extreme case might be put, of two persons agreeing to be bound as to a particular fact in dispute between them being decided by a referee putting his mark on a piece of paper. Suppose he did put his mark upon it, the paper would not appear to be an award, and would not by the act of parliament, as it appears to me, require a stamp. Then as to the question of misdirection, the learned judge appears to have left at large the whole question to the jury; it was open to the jury to say whether the fact was true which this paper purports to have found for the plaintiff; neither the plaintiff nor the defendant were conclusively bound by the award, and if the learned judge had stopped at the intimation of his opinion that the finding of the mining jury was conclusive, there ought to be a new trial; but he went on to explain; he states in his report, that he left it open to the jury to say whether or not they were satisfied on the evidence, that the defendant at the time the accident happened was in the occupation of the shaft; of that there was evidence on both sides; and the damages being under 20*l.* we cannot grant a new trial on the ground of the verdict being against evidence; and therefore, it seems to me, the verdict cannot be disturbed.

(*c*) Peake's add. Cases, 238. (*d*) 5 Esp. 145.

BOLLAND, B.—I am of the same opinion, for the reasons given by my brother *Parke*. In respect to its being against evidence, as the verdict is so small, it is better we should adhere to our rules; there is evidence on the other side, slight I own, but the evidence was left to the jury. If it had stood on the first part of the summing up, I should have agreed there was a misdirection; but when the learned judge goes on to say, I also directed them to consider whether the defendant, if he had the shaft, had parted with his interest in it previous to the accident, the objection to the previous part is removed.

ALDERSON, B.—I am of the same opinion. I very much regret we cannot grant a new trial consistently with the rules of the court, for I cannot help feeling the verdict is wrong.

Rule discharged.

HUTTON *v.* WARREN, Clerk.

ASSUMPSIT. The declaration stated, that the plaintiff, on the 25th of *March*, 1833, became tenant to the defendant, who then was rector of the parish of *Wroot*, in the county of *Lincoln*, of a certain farm, glebe land, premises, and tithes, with other appurtenances, situate in the said parish, upon the terms and conditions that the plaintiff, his executors, administrators, or assigns, should and would, during the said tenancy, manage, till, sow, and cultivate the said farm, &c., in a husband-like manner, according to the custom of the country; and that the defendant should, after the expiration of the said tenancy, make and pay to the plaintiff all such reasonable allowances as the plaintiff, as off-going tenant, should, according to the custom of the country, be entitled to receive from the defendant, in respect of any tillage, sowing, or cultivation of the said farm, &c., according to the custom of the country. The declaration then averred mutual promises, and proceeded to allege that the plaintiff continued such tenant until the 25th of *March*, 1834, when the said tenancy was determined, by notice from the defendant to quit the farm. That the plaintiff, during the said tenancy, to wit, on the first of *February*, 1833, and on other days, &c., according to the course of good husbandry, and in tilling, &c., the said farm according to the custom of the country, bestowed his work and labour, and used seeds and corn in sowing divers parts of the said farm, &c., with barley, blend corn and clover, and other seeds; and also bestowed his work and labour in cultivating the said barley, &c., until the determination of the said tenancy; and was, by the determination thereof, prevented from enjoying the crops arising from the said barley, &c.; and the plaintiff, according to the custom of the country, was, as off-going tenant, entitled to certain fair, reasonable, and customary allowances, in respect of such tillage, &c., amounting in the whole to the sum of 99*l.* 7*s.* 6*d.*; yet the defendant would not pay the same, &c.

Pleas.—First, non-assumpsit; secondly, that the plaintiff was not tenant to the defendant on the terms and conditions in the declaration mentioned;

The custom of the country, as to the tenant's way-going rights to an allowance for seeds and labour on the land, is not excluded by a stipulation in his lease that, on leaving, he should consume three-fourths of the hay and straw on the land, and bestow the manure therefrom on the land; leaving the unconsumed manure for the landlord, he paying for it.

A tenant occupied land at the expiration of a lease, with the assent of the lessor, a parson: on the determination of his title, he continued to be tenant to his successor.—*Held*, that he was tenant under the terms of the original lease (*a*).

(*a*) Vide *Buckworth* v. *Simpson*, *ante*, vol. 1. p. 38.

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thirdly, that the plaintiff, according to good husbandry, and in tilling, &c., according to the custom of the country, did not bestow his work or labour, or use any seed or corn, &c., or bestow his work or labour on the said barley, &c., *modo et formâ;* fourthly, that the plaintiff, according to the custom of the country, was not entitled, as off-going tenant, &c.

At the trial, before *Gaselee*, J., at the last summer assizes for the county of *Lincoln*, it appeared that the farm in question was a part of the glebe of the parish of *Wroot*, which had been occupied by the plaintiff as tenant from the year 1811, until he quitted at *Lady Day*, 1834. The original demise to the plaintiff was by a lease for six years, from *Lady Day*, 1811, at a rent of 150*l.*, granted by a previous incumbent of the living, who was the defendant's father. He resigned in *October*, 1832, and the defendant was presented to it. At *Michaelmas*, 1833, the defendant gave the plaintiff a half-year's notice to quit. In the following *October*, the defendant gave the plaintiff a formal notice, requiring him to sow the land, and cultivate the farm in due course of husbandry, according to the custom of the country. Discussion had previously taken place between the plaintiff, the defendant's attorney, and the defendant, upon the plaintiff's obligation to sow, according to the custom of the country, and his right to an allowance on leaving. The custom of the country was proved to be, that, the land having been cultivated according to the customary course of husbandry, the out-going tenant was entitled to an allowance for seed, and for the manure on the land, if the landlord elected to purchase it, as he had a right to do. The allowance was valued at 95*l.* 17*s.* 6½*d.*, for which the action was brought.

On the part of the defendant it was contended, that the plaintiff held on the same terms as under the lease originally granted, and that this excluded the custom of the country.

In answer, the plaintiff contended, that he was not bound by the terms of the lease at all; but that, if he were, they were consistent with the custom of the country, which was obligatory in conjunction with the express stipulations of the lease. The lease was put in; it bore date the 2nd of *January*, 1811, and was a demise for six years, to commence at *Lady Day* following, of the parsonage-house and glebe land, and the tithes of the parish, at an annual rent of 150*l.* for the house and land, and 200*l.* for the tithes, to be void on the death, resignation, &c., of the lessor. It contained covenants by the plaintiff, that, at the end, or other sooner determination of the term, he would quit, yield, and deliver up the premises, in good order and condition, to the lessor and his successors; "and also should spend and consume three parts in four of the hay and straw arising from the said glebe land and tithes, so demised as aforesaid, upon the said glebe land, and spread and bestow the compost, or manure as should not be so spread or bestowed on the said premises, at the end or other sooner determination of the said term, upon the said premises, to and for the use of the said *J. W.* (the lessor,) or his successors, he or his successors paying a reasonable price for the same." The learned judge reserved the point, by leave to enter a nonsuit.

Balguy obtained a rule accordingly; against which,

Humfrey and *Waddington* shewed cause.—First; the plaintiff was not bound by the stipulations of the lease at all. It is true, that when a tenant continues

in possession after the expiration of a demise, he is presumed to hold on the terms of the first demise; but in this case, the express demise had ceased in the lifetime of the previous incumbent. The plaintiff had become tenant from year to year, and then defendant was no party to the continuance of the original holding. But, at all events, presumption that the continued holding was on the original terms may be rebutted, and it is here rebutted, by the conduct of the parties giving the plaintiff notice to cultivate according to the custom.

Secondly.—The terms of the lease do not exclude the operation of the custom of the country: they are quite consistent with it. In *Wiglesworth* v. *Dalison* (*a*), the rule was laid down, that the custom was imported into a demise under seal, if it be not inconsistent with it. In *Senior* v. *Armitage* (*b*), an action was brought by a tenant against his landlord for compensation for half-tillage, crops sown, value of way-going crops, &c.; and it appeared that there was a written agreement under which the farm was held; but Lord Chief Baron *Thompson* told the jury that, "in order to control the custom, it must be of such a nature that it operated upon, and prevented in express terms, the custom from attaching." [*Alderson*, B., I think that position is not law now to its full extent.] It is not necessary to contend that it is. [*Parke*, B.—Mr. Justice *Bayley* tried the case of *Senior* v. *Armitage* the first time; and supposing his recollection of it to be accurate, it would appear, from what he says of it in the case of *Webb* v. *Plummer* (*c*), that the lease was wholly silent as to the terms of quitting.] That would reconcile the cases of *Senior* v. *Armitage*, and *Webb* v. *Plummer*. The dictum of *Bayley*, J., in the latter case, is, that "where there is a written agreement between the parties, it is naturally to be expected that it will contain all the terms of their bargain; but if it is entirely silent as to the terms of quitting, it may let in the custom of the country, as to that particular. If, however, it specifies any of those terms, "we must then go by the lease alone;" must be understood to mean only, that where certain allowances are stipulated for, other allowances shall not be made; indeed, a contrary rule would admit the custom of the country to vary the stipulation. In the later case of *Holding* v. *Pigott* (*d*), the rule was considered to be, that the custom of the country is excluded only where any condition is found in the lease necessarily repugnant to, or inconsistent with, the custom. It is quite impossible that the covenant in the present case can embody all the terms intended by the parties to govern the occupation of the land, and the way-going rights accruing to the tenant. The argument must apply as well to the one as the other, and it must go to the length that the custom of the country, as to cultivation, is excluded, because it is stipulated that the tenant should consume three-fourths of the hay and straw, and spread and bestow the manure therefrom: that is the only obligation on the tenant, if it is to be taken as defined by the express terms of the lease.

Balguy and *Miller contrà*.—The plaintiff was tenant, and the plaintiff's tenancy was allowed to continue by the defendants; that raises a presumption that it was in the original terms, which there is nothing in the conduct of the parties to rebut. Secondly.—The plaintiff was not entitled to the allowances

(*a*) Doug. 206.
(*b*) Holt's N. P. C. 197.
(*c*) 2 B. & Ald. 751.
(*d*) 7 Bing. 474.

for the way-going crops: the lease stipulated some of the terms of quitting; and the judgments of *Bayley* and *Holroyd*, J., in *Webb* v. *Blummer*, are, that such expressed terms exclude any implied terms. To the same purport is the observation of Lord *Lyndhurst*, in *Roberts* v. *Barker* (*e*), that "if the parties meant to be governed by the custom in any respect, there was no necessity for any stipulation; as, by the custom, the tenant would be bound to leave the manure, and would be entitled to be paid for it."

PARKE, B.—We will take time to consider this case, and endeavour to get a report of the case of *Senior* v. *Armitage*, and ascertain how it was ultimately disposed of. *Cur. adv. vult.*

The judgment of the Court was delivered by

PARKE, B.—(After stating the pleadings, he continued.)—It appeared on the trial, that the plaintiff took the farm of the late incumbent, the father of the defendant, on the 2nd of *January*, 1811, by a lease under seal, comprising the tithes of the parish also, at the rent of 150*l.* for the farm, and 200*l.* for the tithes, payable at *Michaelmas* and *Lady Day*, for the term of six years from *Lady Day*, 1811, if the lessor should so long continue incumbent. The plaintiff occupied until *October*, 1832, when the incumbent resigned, and the defendant, his son, succeeded him in the living. The plaintiff continued to occupy the farm and tithes, paying the same rent, at the same time, until *Lady Day*, 1834, when he quitted, in pursuance of a notice given to him by the defendant; and he claimed in this action the allowances for seed and labour, due to the off-going tenant by the custom of the country.

The defendant resisted the claim, on the ground that he held under the terms of the written lease; and that by those, he was not entitled to any such allowances.

It was proved, that, by the custom of the country, a tenant was bound to farm according to a certain course of husbandry for the whole of his tenancy, and at quitting was entitled to a fair allowance for seed and labour on the arable land, and was obliged to leave the manure, if the landlord would purchase it. In *October*, 1833, after the notice to quit, the defendant, his agent, and the plaintiff, had an interview; and the agent insisted that the plaintiff should sow the arable land, and that he was bound to keep the farm in regular course. The plaintiff accordingly did, afterwards, sow the arable land, for which he claimed the compensation in question.

Two points were made on the argument before us: first, whether the plaintiff was bound by the terms of the lease at all, after the resignation of the lessor: secondly, whether, if he was, those terms excluded him from this claim.

Upon the first point, we think that the plaintiff must be taken, in the absence of evidence to the contrary, to have held under the defendant on the same terms that he held under his father, so far as those terms were applicable to a tenancy from year to year. No evidence was given to the contrary on the trial; and, indeed, this objection does not appear to have been there raised on the part of the plaintiff.

The second question requires some consideration. The custom of the country, as to cultivation and the terms of quitting, with respect to allowances for

(*e*) 1 C. & M. 810.

seed and labour, is clearly applicable to a tenancy from year to year; and therefore, if this custom was by implication imported into the lease, the plaintiff and defendant were bound by it after the lease expired.

We are of opinion that this custom was by implication imported into the lease.

It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, on matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established, and prevailed; and this has been done upon the principle of presumption, that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound: but a contract, with reference to these known usages,—whether such a relaxation of the strictness of the common law was wisely applied, where formal instruments have been entered into, and particularly leases under seal,—may well be doubted. But the contrary has been established by such authority, and the relations between landlord and tenant have been so long regulated upon the supposition that all customary obligations, not altered by the contract, are to remain in force, that it is too late to pursue a contrary course; and it would be productive of much inconvenience, if this practice were now to be disturbed.

The common law, indeed, does so little to prescribe the relative duties of landlord and tenant, since it leaves the latter at liberty to pursue any course of management he pleases, provided he is not guilty of waste, that it is by no means surprising that the courts should have been favourably inclined to the introduction of those regulations in the mode of cultivation, which custom and usage have established in each district to be the most beneficial to all parties.

Accordingly, in *Wigglesworth* v. *Dallison*, afterwards affirmed on a writ of error, the tenant was allowed an away-going crop, though there was a formal lease under seal. There the lease was entirely silent on the subject of such a right; and Lord *Mansfield* said that the custom did not alter or contradict the lease, but only superadded something to it.

This question subsequently came under the consideration of the Court of King's Bench, in the case of *Senior* v. *Armitage*, reported in Mr. *Holt*'s Nisi Prius Cases. In that case, which was an action by a tenant against his landlord for a compensation for seed and labour, under the denomination of tenant-right, Mr. Justice *Bayley*, on its appearing that there was a written agreement between the parties, nonsuited the plaintiff. The Court afterwards set aside that nonsuit, and held, as appears by a manuscript note of that learned judge, that, though there was a written contract between landlord and tenant, the custom of the country would be still binding, if not inconsistent with the terms of such written contract; and that not only all common law obligations, but those imposed by custom, were in full force where the contract did not vary them. Mr. *Holt* appears to have stated the case too strongly, when he said that the Court held the custom to be operative, "unless the agreement in express terms excluded it;" and probably he has not been quite accurate, as attributing a similar opinion to the Lord Chief Baron *Thompson*, who presided on the second trial. It would appear that the Court held that the custom operated, unless it could be collected from the instrument, either expressly or impliedly, that the parties did not mean to be governed by it.

Exchequer.

HUTTON v. WARREN.

On the second trial, the Lord Chief Baron *Thompson* held that the custom prevailed, although the written instrument contained an express stipulation that all the manure made on the farm should be spent on it, or left at the end of the tenancy without any compensation being paid. Such a stipulation certainly does not exclude by implication the tenant's right to receive a compensation for seed and labour.

The next reported case on this subject is that of *Webb* v. *Plummer*, in which there was a lease of down-land, with a covenant to spend all the produce on the premises, and to fold a flock of sheep upon the usual part of the farm; and also, in the last year of the term, to carry out the manure on parts of the fallowed farm pointed out by the lessor, the lessor paying for the fallowing land and carrying out the dung; but nothing for the dung itself, and paying for grass on the ground, and thrashing the corn. The claim was for a customary allowance for foldage (a mode of manuring the ground); but the Court held, that as there was an express provision for some payment, on quitting, for the things covenanted to be done, and an omission for foldage, the customary obligation to pay for the latter was excluded. No doubt could exist in that case, but that the language of the lease was equivalent to a stipulation that the lessor should pay for the things mentioned, and no more.

The question then is, whether, from the terms of the lease now under consideration, it can be collected that the parties intended to exclude the customary obligation to make allowances for seed and labour. The only clause relating to the management of the farm (except the covenant to repair,) is one which stipulated that the plaintiff shall spend and consume on the farm three-fourths of the hay and straw, arising not only from the farm itself, but from the demised tithes of the whole parish, and spread the manure, leaving such as should not be spread at the end of the term for the use of the landlord, on paying a reasonable price for the same. This provision introduces and has a principal reference to a subject to which the custom of the country does not apply at all, namely, the tithes, and imposes a new obligation on the tenant, *dehors* that custom, and then qualifies that obligation by an engagement on the landlord's part to give a remuneration by repurchasing a part of the produce in a particular event. It is by no means to be inferred from this provision, that this is the only compensation which the tenant is to receive on quitting. If, indeed, there had been a covenant by the tenant to plough and sow a certain portion of the demised land in the last year, being such as the custom of the country required, he being paid on quitting for the ploughing; or to plough, sow, and manure, he being paid for the manuring; the principle of *expressum facit cessare tacitum*, which governed the decision in *Webb* v. *Plummer*, would have applied; but that is not the case here. The custom of the country, as to the obligation of the tenant to plough and sow, and the corresponding obligation of the landlord to pay for such ploughing and sowing in the last year of the term, is in no way varied. The only alteration made in the custom is, that the tenant is obliged to spend more than the produce of the farm on the premises, being paid for it in the same way as he would have been for that which the custom required him to spend. We are therefore of opinion that the plaintiff is entitled to recover, and the rule must be discharged.

Rule discharged.

CROSBY and another *v.* CLARKE.

Exchequer.

An affidavit of debt, made by an indorsee of a bill of exchange against the drawer, not shewing a default in the acceptor, is bad.

J. J. *WILLIAMS* moved for a rule to shew cause why the defendant should not be discharged out of custody, on the ground that the affidavit of debt did not sufficiently state the default of the acceptor of a bill of exchange, on which the action was brought. The affidavit stated the defendant was indebted to the plaintiff as the drawer and indorser of a bill of exchange for 100*l.*, accepted by *A. B.*, alleging the defendant's secondary liability. It stated that the said bill of exchange was due, and expired at a certain day now past; and that the sum of 100*l.*, thereby made payable, was still due and unpaid by the defendant to the plaintiff.

Dowling shewed cause, in the first instance.—The affidavit is sufficient. It is not necessary, in an affidavit against the drawer of a bill of exchange, to state the default of the acceptor. *Witham* v. *Gompertz* (*a*). It is true that *Cross* v. *Morgan* (*b*), and *Banting* v. *Jadis* (*c*), recognize the doctrine of *Buckworth* v. *Levy* (*d*); but they altogether depend on the authority of that case, which was much shaken, if not overruled, in *Weeden* v. *Medley* (*e*), and *Irving* v. *Heaton* (*f*). The positive allegation, that the defendant is indebted, supplies a more formal statement, if the statement actually given shews that there may be a legal debt due.

J. J. Williams contrà.—*Weeden* v. *Medley*, and *Witham* v. *Gompertz*, decide the same point, that it is not necessary to allege in terms a presentment to the acceptor. *Buckworth* v. *Levy* is expressly in point; and it was recognized in *Banting* v. *Jadis*, which was in effect a decision of the full Court of King's Bench.

Lord ABINGER, C. B.—It appears that *Buckworth* v. *Levy* has received the sanction of my brothers *Littledale* and *Patteson*, and several of the other judges. I think, therefore, we ought to adhere to that decision.

PARKE, B.—*Buckworth* v. *Levy*, *Cross* v. *Morgan*, and *Banting* v. *Jadis*, are authorities that this affidavit is insufficient. *Witham* v. *Gompertz* is no authority to the contrary; all that case decided was, that the statement of a refusal to pay by the acceptor was sufficient without stating all those facts which it would be necessary to aver in a declaration to charge the drawer. Then *Weeden* v. *Medley* was decided on the ground that the want of an averment of presentment was not alone an objection to an affidavit of debt; and *Irving* v. *Heaton* depends on the authority of *Weeden* v. *Medley*.

BOLLAND, B., and ALDERSON, B., concurred.

Rule absolute.

(*a*) 2 C. M. & R. 736; *ante*, vol. 1, p. .
(*b*) 1 Dowl. P. C. 122.
(*c*) *Id.* 445.
(*d*) 7 Bing. 251.
(*e*) 2 Dowl. P. C. 689.
(*f*) 4 Dowl. P. C. 638. S. C.

Exchequer.

JENKINSON *v.* MORTON.

The *Middlesex* Court of Requests' Act does not apply where the plaintiff's claim is reduced below 40*s.* by a set-off.

ASSUMPSIT on a tailor's bill for 17*l.* *Plea.*—Set-off; and verdict for the plaintiff for 15*s.*, the defendant proving a set-off to the amount of 16*l.* 5*s.* *C. Jones* obtained a rule to shew cause why a suggestion should not be entered on the roll, pursuant to the *Middlesex* County Act, 23 G. 3, c. 33, s. 19, to entitle the defendant to double costs.

Humfrey shewed cause. The amount proved to be due to the plaintiff being reduced below 40*s.* only by the plea of set-off, the case is not within the statute. The rule is laid down in *Tidd* (*a*) to be constant and invariable, "that none of the Court of Conscience Acts extend to cases where the debt, being originally above the limited amount, is reduced under it by means of a set-off or tender." In *Jons* v. *Harris* (*b*), the authority of *Pitt* v. *Carpenter* (*c*) is fully recognized by *Taunton*, J. The Court there observed,—"How could the plaintiff tell whether the defendant would set-off anything in that action, so as to be bound to choose that jurisdiction? Besides, he has in effect recovered 4*l.* 15*s.* 3*d.*, because a debt, which he must otherwise have paid, is satisfied. Here are two causes determined, both of them of greater value than is within the inferior jurisdiction." The 19th section applies only where defendants "are liable to be summoned in the said county courts;" and by reference to the first and fourth sections of the act, it clearly appears that the plaintiff could not have proceeded in the inferior court for the recovery of his demand. There was no mode of proceeding for the balance only: the defendant was under no obligation to set off his debt; and if the plaintiff had proceeded for the balance only, he would have had no defence in an action for the cross demand."

C. Jones, in support of the rule. The words of the 19th section are express, that the defendant shall have double costs in all cases where "the jury, upon the trial of such cause, shall find the damages for the plaintiff under forty shillings." The argument, on the other side, would apply equally where there had been a payment or tender; and in several cases, overruling an observation of *Eyre*, C. J., it has been determined that the act applies where the plaintiff's demand has been reduced by a payment. *Bateman* v. *Smith* (*d*); *Chadwick* v. *Bunning* (*e*); *Clarke* v. *Askew* (*f*); *Horn* v. *Hughes* (*g*). It has also been decided, that, in cases where a defendant has been arrested, and the amount sworn to is reduced by a set-off, the defendant is entitled to his costs. [*Parke*, B.—The cross debt is a security for the plaintiff; therefore it is unnecessary for him to arrest for the whole amount.]

Lord ABINGER, C. B.—I think this is a very clear case. No authority has been cited to shew that this statute applies to the case of a verdict reduced by

(*a*) 959. (9th edit.)
(*b*) 1 Dowl. P. C. 375.
(*c*) 2 Str. 1191.
(*d*) 14 East, 301.
(*e*) 5 B. & C. 532.
(*f*) 8 East, 28.
(*g*) Ib. 347.

a set-off: in all the cases in which the act has been held to apply, there was no debt exceeding 40*s.* at the time of the commencement of the suit; but in the case of a set-off, it is at the defendant's pleasure that the plaintiff's claim is reduced. A contrary construction, as was said by *Eyre*, C. J., would give courts of requests jurisdiction to investigate the most complicated accounts. On reference to the first section, it appears clearly that the plaintiff could not have proceeded for his whole demand.

PARKE, B.—I am of the same opinion. The general rule, in the construction of these acts, is, that they extend to cases where, by payment, or some other mode, so much of the debt is put an end to altogether. Looking at the 19th section alone, there might be some ground to contend that it bore a wider effect; but in referring to the 1st section, and reading that with the 19th, it appears clearly that the debt must be such that it might have been recovered in the county court.

BOLLAND, B.—There is a manifest difference between a payment and a set-off. A payment has the effect of reducing *pro tanto* the debt to the plaintiff; a set-off does so only at the option of the defendant.

ALDERSON, B.—Before a party can be prejudiced by bringing an action in a superior court, it must be shewn he might have proceeded in the inferior court: it is clear in this case that the plaintiff could not have proceeded in the inferior court.

Rule discharged, with costs.

FORBES *v.* CROW.

PETERSDORFF obtained a rule for costs of the day, on an affidavit that the notice of trial had been continued only by a two days' notice of continuance; and that the defendant and his witnesses resided more than forty miles from *London*.

Notices of trial by continuance, and of countermand of notice of trial, must be given the same time before the expiration of the notice of trial.

Humfrey shewed cause. The practice in such cases requires six days' notice of countermand; but notice of trial may be continued by a two days' notice.

Per Curiam.—We understand from the master that such has been the practice; but we think it reasonable that the notices of countermand, and of continuance, should be given at the same period; and in future it must be understood that that is to be the practice.

Rule discharged: the defendant's costs to be costs in the cause.

Exchequer.

LEWIS *v.* ASHTON.

To discharge a rule to give costs to a defendant, who has been arrested for a larger sum than the verdict, it is not sufficient to give the Court reasonable ground to believe that the whole sum was due, but it must be shewn that the plaintiff had reasonable ground to expect to obtain a verdict for the whole amount.

MOTION to give the defendant his costs, under the stat. 43 G. 3, c. 46, s. 3, he having been arrested for 43*l.*, and the verdict being for 18*l.* In the affidavit, in support of the rule, the defendant swore he never owed the plaintiff more than 1*l.*

Chilton and *E. V. Williams* shewed cause, on an affidavit of the plaintiff, that the whole amount was due, having been lent by her to the defendant at different times. There were also affidavits of several other persons, that the defendant had admitted that the plaintiff had lent him nearly 20*l.*

The Court said, that though the affidavits left little doubt that the defendant had made a false affidavit, and that the whole amount was due, yet, as it did not appear the plaintiff had any reasonable ground to expect she could prove the whole amount to be due, the rule must be made absolute.

Rule absolute.

RICHARDSON *et Ux.* *v.* ROBERTSON.

It being admitted that a payment had been made to the plaintiff after action brought, the Court reduced the verdict by that amount.

Qu. Whether evidence of payment, either before or after action brought, is admissible in evidence in reduction of damages, the only plea being non-assumpsit.

ASSUMPSIT. *Plea.*—Non-assumpsit. At the trial before Lord *Abinger*, at the sittings in *London* after last term, the plaintiff made out a case to the amount of 100*l.*, which the defendant offered to reduce, by proof of a payment of 50*l.*, made after the commencement of the suit. The lord chief baron was of opinion that the evidence was inadmissible, and rejected the evidence, giving the defendant leave to move to reduce the verdict to 50*l.* *Steer* obtained a rule accordingly; against which,

Hoggins shewed cause.—A payment after action brought, should have been made into court by plea, under the rule H. T. 4 W. 4, c. 17. Giving evidence of a payment after action brought, without a special plea giving notice to the plaintiff, is as objectionable, and as much opposed to the principles of the new rules, as to give evidence of a payment made before the commencement of the suit; and that, by the rule, is required to be specially pleaded.

LORD ABINGER, C. B.—This is not an application for a new trial, but to reduce the damages by the amount of a payment which is not denied. For that purpose, the Court think the rule may be made absolute.

PARKE, B.—It has been decided, that evidence of a payment before action brought, may be given in evidence in reduction of damages, though not specially pleaded; *Shirley* v. *Jacobs* (*a*): that case is, however, opposed to the

(*a*) 2 Bing. N. C. 88. S. C. 1 Hodges, 214.

ruling of Lord *Denman*, at *Nisi Prius*, (*b*), in which the other judges certainly concurred at the time.

ALDERSON, B.—The Court give no opinion upon the point. This rule is merely to reduce the damages, under the peculiar circumstances of the case.

Rule absolute.

(*b*) *Lediard* v. *Boucher*, 7 C. & P. 1.

VERNON *v.* TURLEY.

ARCHBOLD obtained a rule to shew cause why the proceedings on the bail-bond should not be set aside for irregularity, on the ground that the plaintiff had declared *de bene esse* in the original action after he had sued out process against the bail (*a*).

A declaration *de bene esse*, in the original action, is not a waiver of a previously commenced suit on the bail-bond.

Erle and *Whitmore* shewed cause. Proceeding in the original cause, after a suit on the bail-bond has been actually commenced, is no waiver of that suit. *Collett* v. *Bland* (*b*).

Per Curiam. A conditional proceeding, such as that of declaring *de bene esse* in the original action, is no waiver of the action against the bail.

Rule discharged.

(*a*) The rule was also obtained on the ground that time had been given to the original defendant; but it appeared that the agreement to give time was only conditional on the defendant to sign an agreement which he did not sign. *Ladbrook* v. *Hewett* (1 Dowl. P. C. 488,) was cited.

(*b*) 4 Taunt. 716.

HOUGH *v.* BOND.

PETERSDORFF obtained a rule to shew cause why the judgment signed in this case, for want of a plea, should not be set aside for irregularity. The defendant, on the 19th, pleaded a plea dated 20th, and the plaintiff, on the 20th, without any demand of a plea, signed judgment, treating the plea as a nullity.

A plea which the plaintiff treats as a nullity, is not a waiver of a demand of a plea.

Curwood shewed cause. The fact of pleading, though the plea be irregular, is a waiver of a demand of a plea; and the plaintiff may sign judgment, if the plea be a nullity. *Lockhart* v. *Mackreth* (*a*); *Perry* v. *Fisher* (*b*); *Bond* v. *Smart* (*c*).

Petersdorff.—The plaintiff could not treat the plea as a nullity in one view, and as available as a waiver in another. An irregular plea would be a waiver, but not a plea which is a nullity. *Dakins* v. *Wagner* (*d*) is an authority that

(*a*) 5 T. R. 661.
(*b*) 6 East, 549.
(*c*) 1 Ch. R. 735.
(*d*) 3 Dowl. 535.

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the plaintiff cannot sign judgment before the usual time for pleading is out, though the defendant deliver a plea which is a nullity.

PARKE, B.—The Court are of opinion that a former decision (*z*) in this court should govern this case. If a plea be treated as a nullity at all, it must be treated so for all purposes, and the plaintiff could not sign judgment without a demand of a plea.

Rule absolute.

(*z*) *Macher* v. *Billing*, 1 C., M., & R., 577.

ROLFE and another *v.* SWANN.

The blank after "of" in the writ of capias must be filled up with the place and county of the residence, or supposed residence, of the defendant, or wherein the defendant shall be, or shall be supposed to be, as directed by the first section of the stat. 2 W. 4. c. 39.

BUSBY obtained a rule to shew cause why a copy of a writ of capias, and the service thereof, should not be set aside, and the bail-bond delivered up to be cancelled, on the ground that the description of the defendant in the writ was insufficient. The description was, "*Thomas Swann*, a clerk in the *Army Pay Office*, *Somerset House*, in the city of *Westminster*, and county of *Middlesex*." The affidavit on which the rule was obtained stated that there was no such office as the *Army Pay Office* at *Somerset House*; that the defendant resided at 25, *Oxford Terrace*, *Edgware Road*; and that his place of business was the *Army Pay Office*, *Whitehall*.

W. H. Watson shewed cause.—In *Hill* v. *Harvey* (*a*), the distinction was taken between a writ of summons and a writ of capias:—"A writ of summons is served on the defendant himself, the writ of capias is directed to the sheriff." And this Court held, that a *designatio personæ* was sufficient; and that that might be effected by some reference to the individual, or by giving the place of his residence, or, if that could not be accomplished, then the place of his supposed residence. That decision supports the previous cases of *Walsh* v. *Langford* (*b*) and *Buffle* v. *Jackson* (*c*). In *Clarke* v. *Palmer* (*d*), Lord *Tenterden* appears to have considered that the description of the defendant was introduced merely for the benefit of the sheriff. If so, the defendant would not be a party to object to its sufficiency. In *Roberts* v. *Wedderburne* (*e*) it was certainly decided that the place of the defendant's residence must be stated; but the point has since been more fully investigated in the cases cited. The misdescription of the *Army Pay Office* could not have misled the defendants. In *Roberts* v. *Williams* (*f*), it was decided, that the place of an attorney's office was his place of abode within the meaning of the statute 24 G. 2, c. 44.

Busby, in support of the rule.—The blank "E. F. of ," in the schedule of the Annuity Act, 53 G. 3, c. 141, it has been decided, must be filled up with the residence of the party. *Darwin* v. *Lincoln* (*g*), *Smith* v. *Pritchard* (*h*), *Roberts* v. *Wedderburne* (*i*), and *Layridge* v. *Roe* (*k*).

(*a*) Ante, vol. 1, p. 185; 2 C., M., & R. 305.
(*b*) 2 Dowl. 498.
(*c*) Id. 505.
(*d*) 9 B. & C. 155.
(*e*) 1 Bing. N. C. 4.
(*f*) Ante, vol. 1, p. 315.
(*g*) 5 B. & Ald. 444.
(*h*) Id. 717.
(*i*) 1 Bing. N. C. 4.
(*k*) Id. 6.

PARKE, B.—It seems to me that this rule must be made absolute. The form in the schedule referred to in the statute 3 W. 4, c. 39, s. 4, has a blank after "of—"; and that must be, *primâ facie*, taken to require the insertion of the residence. We may also call in aid of this construction, the first section of the act, which requires, in every writ of summons, "the place and county of the residence, or supposed residence, of the party defendant, or wherein the defendant shall be, or shall be supposed to be." Any one of these four descriptions would be sufficient. The Court of Common Pleas, in two cases, have put the same construction on the enactment relating to the writ of capias, and I feel disposed to abide by their decision. *Walsh* v. *Langford* may be supported as giving a description of the supposed place of residence of the defendant. In *Hill* v. *Harvey* it does not appear that the decision of the Court of Common Pleas was cited or considered. The defendant is not said to be "of the *Army Pay Office;*" there is no place mentioned where he resides or is most likely to be found.

BOLLAND, B., concurred.

ALDERSON, B.—I am of the same opinion. The safest way to proceed in filling up the blank is to refer to the first section. The plaintiff must give the best description he can. Why might he not describe the defendant as "of the county of *Middlesex?*" giving that description at the peril of its appearing that he might give a better description.

Rule absolute.

Parke, B., observed that it was not necessary the writ should give a description of a residence within the county to the sheriff of which the writ was directed.

STRONG *v.* DICKENSON.

F. V. LEE obtained a rule to shew cause why the defendant, who was a practising attorney, should not be discharged out of custody, on the ground that when he was taken, on a writ of *capias ad satisfaciendum*, he was privileged. The affidavit of the defendant, describing himself as of 19, *Gracechurch Street, London*, on which the rule was granted, stated that, having several causes to attend to, then pending in the Courts of Common Pleas and Exchequer, he was proceeding through the city of *London*, on his way to *Westminster Hall*, when, on his arrival at the Bank of *England*, recollecting that he had some business with a client whom he was likely to find at the Auction Mart, he went there, and found his client, a Mr. *Hunter;* and that, as he was on the point of leaving him to proceed to *Westminster Hall*, he was arrested. On shewing cause, the affidavit of the officer stated that the defendant was taken into custody in the Auction Mart Coffee House, between the hours of two and three in the day; that he then did not say anything about going to some business with a client whom he was likely to meet at the Auction Mart, he went there, and saw the party, and as he was leaving him to proceed to *Westminster*, he was arrested. The affidavits in answer stated that he was arrested between the hours of two and three, P. M., in the Auction Mart Coffee House; that he then said nothing about going to *Westminster;* and that he said he was there to negotiate a loan, with which he intended to pay plaintiff. *Held*, that these facts did not shew a case of privilege.

A defendant, in support of an application to be discharged out of custody, on the ground of privilege, in an affidavit, stated, that, having several cases to attend in the Courts of C. P. and Exch., he was proceeding through the city on his way to *Westminster*, and when at the Bank of *England*, the recollection of

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Westminster on business, but said he was there for the purpose of negotiating a loan of money, with which, if effected, he intended to pay the plaintiff. A person who had been engaged in watching the defendant also deposed that he saw the defendant come out of the *Excise Office*, in *Broad Street*, about half-past one o'clock; but he went directly to the Auction Mart Coffee House, passing down *Throgmorton Street*, and not going by the Bank of *England*, which way through *Throgmorton Street* was not the direct line to *Westminster*. Two other persons, who occupied part of the premises, 19, *Gracechurch Street*, deposed, that for several weeks past the defendant had not been seen to go to his office.

Platt shewed cause.—It appears, upon the affidavits, that, at the time the defendant was taken, he was sitting in the coffee-house, quite out of the line to go to *Westminster Hall*. It seems very doubtful, upon the affidavits, whether the defendant was going to *Westminster Hall* at all; and it is clear that there was not a *bond fide* deviation from the course in which he would have been privileged, but that he was at a place altogether foreign to that course, and on business entirely unconnected with the object he professed to have in view at *Westminster*.

Ludlow, Serjt., and *F. V. Lee*, in support of the rule.—The defendant was *bond fide* employed on an occasion which protected him from arrest; and a temporary deviation from the direct route, unless there was an unreasonable delay, will not deprive him of the protection, which is given, not for his advantage, but his client's. *Pitt* v. *Coomb* (*a*). [*Parke*, B.—The affidavit of the defendant does not state that his sole object was to proceed to *Westminster;* it is consistent with that affidavit that he intended to do a great deal of business before proceeding there.] The defendant swears that he was, when arrested, on the point of proceeding to *Westminster* (*b*).

Lord ABINGER, C. B.—The privilege from arrest extends to the time in which the party is substantially *eundo*, *morando*, or *redeundo* for the purpose which confers the privilege; when that is the case, it is not exacted from the party that he should proceed at the utmost speed, or by the nearest way; but there is no case in which he has been held privileged, if he deviated for a purpose entirely unconnected with his progress to or from thence. There is a case in which the party was arrested while dining, and it was held he was privileged; but he must dine somewhere, and the place was not out of his way from the court. In *Holliday* v. *Pitt*, the party was arrested while in fact *redeundo*. Certainly the party claiming the privilege should bring himself within it; but here the affidavit is very defective; and to allow such facts as are stated to be sufficient to bring a party within the privilege, would be establishing a dangerous precedent. It is consistent with the affidavit that the party might have set out in the morning from some place, or on some business entirely unconnected either with the city or *Westminster Hall*, but with the intention in his mind of ultimately arriving at the court. He was in

(*a*) 3 B. & Adol. 1078.
(*b*) *Lumley* v. ——, 1 C. & M. 579; *Lightfoot* v. *Cameron*, 2 W. Bl. 1113; and *Holliday* v. *Pitt*, 2 Str. 986, were also cited.

the coffee-house on business entirely unconnected with the court. I think no grounds are shewn for his discharge.

PARKE, B.—I am of the same opinion; and I found it entirely on the deficiency of the applicant's case. His affidavit does not state that he left his own house in the morning, where that house is, or that he left it to go to *Westminster* in respect of his attendance only at which place could he be privileged. It is quite consistent with it, that he was out on his usual business with his clients as an attorney, having an intention of ultimately going to *Westminster*. It is entirely on that ground I form my opinion: I say nothing as to deviation.

BOLLAND, B.—I am of the same opinion. I am not prepared to say that this defendant ought not to be discharged, if he had stopped at a coffee-house merely for refreshment; such a departure from a direct route for necessary refreshment would not be a deviation; *Lightfoot* v. *Cameron* (*a*); but it appears he went there for quite a different purpose.

ALDERSON, B.—I am of the same opinion. The defendant's affidavit is very lax: it is quite consistent with it, that he might never have gone into the city with the purpose of going that way to Westminster Hall. It is stated too, in one of the affidavits, on which cause was shewn, that his clerk attributed his arrest to his going to the Auction Mart, from which he had endeavoured to dissuade him.

Rule discharged.

(*a*) 2 W. B. C. 1113.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

IN

Trinity Term, 1836.

WARNER and Another *v.* M'KAY.

Where a factor sold goods to A., and made out the invoice in his own name, but at the same time disclosed that they belonged to a principal in *London;* and it appeared that the custom of trade was for the factor to sell in his own name when he was under advances to his principal, as he was in the present instance: *Held*, that A. was entitled to set off a debt due from the factor, in an action brought against him by the principal for the price of the goods.

ASSUMPSIT for goods sold and delivered. *Pleas* as to all, except 85*l.*— first, non-assumpsit; second, payment; third, that the plaintiffs sold the goods in the declaration mentioned, through the agency of certain persons, to wit, Messrs. *Badenoch* and *Jenkinson*, at *Liverpool*, who, at the time of the sale and delivery thereof were the factors and agents of the plaintiffs, and intrusted by them, as such factors and agents, with the said goods; and, with the consent of the plaintiffs, sold them to the defendant, in their own names, as the true and sole owners thereof, by the plaintiffs' consent; and that the plaintiffs did not appear to be the proprietors or owners of the said goods, or interested therein; and that the defendants bought them of B. and J. as their own goods, and did not know, and had not the means of knowing, that the goods belonged to the plaintiff. The plea then went on to aver that B. and J., at the time of the said sale, were indebted to the defendant in a large sum of money, out of which he proposed to set off the price of the goods. The fourth plea stated, that the defendant, having purchased of B. and J. as above stated, paid them for the goods by his acceptance; and as to the sum of 85*l.*, the defendant pleaded payment of it into court. The plaintiff, in his replication, traversed the payment in the second plea; to the third and fourth, he replied *de injuriâ;* and, to the last, acceptance of 85*l.* in satisfaction of that amount. At the trial, at the last *Liverpool* assizes, before *Parke*, B., it appeared that the action was brought by the plaintiffs, who were merchants in *London*, to recover the price of a parcel of currants that had been consigned by them for sale, to *Badenoch* and *Jenkinson*, who were factors at *Liverpool*, and by them sold to the defendant. B. and J., *January* 7, 1835, sold a damaged portion of the currants to the defendant, who was a wholesale grocer in *Liverpool*, and sent with the goods an invoice made out in their own names. On the 6th *February* following, the defendant applied to B. and J. for a further parcel of the currants, who said that they must apply to their principals in *London* as to the

price; and, in a few days afterwards, they communicated to the defendant that the plaintiff required a higher price, which the defendant having agreed to pay, on the 20th a further parcel of currants was delivered, and B. and J. sent with the goods a bought and sold note in the names of the plaintiffs as principals. It further appeared, that when B. and J. sold on their own account, to pay themselves advances, that they were in the habit of making out invoices in their own names; but when they sold as factors only, they sent bought and sold notes in the names of their principal. At the time of the sales, B. and J. were under advances to the plaintiff. On the first of these two sales, the question arose; and it was contended, that as the payment on the sales was to be cash at four months, although the defendant had given to B. and J. a bill for 200*l.* on the 20th *February*, (which, with 85*l.* paid into court, covered the price of the first parcel,) on account, the defendant was not entitled to set this off against the plaintiffs, the principal having been disclosed before payment, and the payment not being made according to the contract. *Parke*, B., told the jury that the 200*l.* bill could not be considered as payment; but that if they thought B. and J. were selling on their own account, the defendant had the same defence against the principals that he would have against them; and that they were to decide whether the distinction of selling part of the goods on an invoice in their own name, and part on a bought and sold note, and the disclosure of there being a principal, ought, in the course of trade, to have put the defendant on the inquiry whether B. and J. were entitled to sell on their own accounts or not. The jury found that B. and J. had communicated the fact of their being only agents to the defendant; but that the defendant believed that B. and J. were entitled to deal with the goods as principals until the 20th *February;* and that the fact of a bought and sold note being delivered on that day, ought not, in the course of trade, to have put the defendant upon further inquiry: a verdict was accordingly entered for the defendant, with leave to the plaintiff to move to enter a verdict for the plaintiff.

Cresswell, having obtained a rule *nisi,* accordingly, in *Easter* Term last, cause was now shewn against it by

Alexander and *Crompton.*—In this case, if B. and J. had been only brokers, there is no question but that they would have been acting out of the scope of their authority. *Baring* v. *Corrie* (*a*). [*Parke,* B.—In that case it is laid down, that a factor, being intrusted with goods, has the power to sell in his own name.] *Carr* v. *Hinchliff* (*b*) is to the same effect; for there, in an action for goods sold and delivered, and a similar plea to the present pleaded, it was held that a factor and principal are identified. This case is distinguished by B. and J. stating, at the time of sale, that the goods belonged to a principal; but that is followed up by the finding of the jury, that B. and J. were entitled to deal with the goods as their own. Ever since *Drinkwater* v. *Goodwin* (*c*), it has been held that a factor, being intrusted with the property, has a right to sell in his own name; and has a lien on the price, if he is under advances. Now, if B. and J. had a lien, they did not lose it on the goods

(*a*) 2 B. & Ald. 137.
(*b*) 4 B. & C. 547.
(*c*) Cowp. 251.

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getting into the hands of the defendant; *Hudson* v. *Grainger* (*c*); nor is the defendant to be limited by the amount of the principal's debt to the factors; and there was no evidence what that debt was. [*Parke*, B.—I did not think that material. It is clear, that when a factor sells, you may have the same defence against the principal that you have against the factor. Now, if B. and T. had sued, it is manifest that the payment might be allowed. What Lord *Kenyon* said in *Stracey* v. *Deey* (*d*) is applicable; if the parties allow the defendant to believe that the factor is the only person contracted with, they could not pull off the mask and claim payment, without allowing the parties the same equities in their defence that they would have had in actions brought by the factor.] As the defendant, therefore, had a right to sell in their own names, the question is, whether the communication of a fact that does not take away the right can alter the case. In one case, *Moore* v. *Clementson* (*e*), the question arose whether there could be a set-off for the factor's debt, in an action brought by the principal, where the factor had sold in his own name, but disclosed his principal before all the goods were delivered; and it was held, that there could not: but here there was a belief that B. and T. were dealing with the goods as their own; and this is an intermediate case between total ignorance of the principal, and a disclosure before the contract. [Lord *Abinger*, C. B.—That case of *Moore* v. *Clementson* (*e*) seems more like this. *Parke*, B.—To make that case good law, you must suppose that notice was given before the contract was complete. Lord *Ellenborough* seems to have assumed, that notice was given before there was sufficient delivery to bind the bargain, and that assumption reconciles it with the other cases.] That last case seems cited generally by Paley (*f*), as a sale by the principal. As to the rule of the party being bound to make particular inquiries as to the right to dispose of the property, that has been thought to be carried too far. *Coates* v. *Lewis* (*g*) is the case most like the present. The expressions in the books, as to disclosing the name of a principal, mean no more than that the factor is selling in that particular case for a principal; and that reconciles all the cases, and keeps the distinction between a factor and a broker well defined. The principle being founded on this, that a factor, being intrusted with the property, obtains a credit which entitles purchasers to a set-off against the principal, in an action for the price of the goods; whereas a broker never has the *indicia* of property: the communication of the fact of a principal, therefore, is immaterial to the case.

Cresswell and *Wightman*, *contrà*.—The rule in this case was moved for, not on the finding of the jury, but on something previous, as if a bill of exception had been tendered to the law laid down by the learned judge. We are therefore not concluded by the verdict. *Drinkwater* v. *Goodwin* (*h*) may be laid out of consideration, though it is doubtful whether a factor may sell goods of a principal, to make up advances whenever he pleases. [Lord *Abinger*, C. B.—If the principal does not interpose his authority, how then?] It is true that in *George* v. *Clagett* (*i*), and that class of cases (*k*) where the principal has al-

(*c*) 5 B. & Al. 27.
(*d*) 7 T. R. 361, in n.
(*e*) 2 Camp. 22.
(*f*) Prin. and Ag. 331.
(*g*) 2 Camp. 444. Paley, Prin. & Ag. 335.
(*h*) Cowp. 251.
(*i*) 7 T. R. 359.
(*k*) See *Robson* v. *Williams*, 7 T. R. 360, n. a. *Escott* v. *Milward*, Co. Bank. Lewes, 236. *Scrinshire* v. *Alderton*, 2 Str. 1182.

lowed the factor to deal with the goods as his own, and his name does not appear at all, he must take the consequences; but those cases are beside the present. Then there is the second class of cases, where the principal has entrusted the factor with goods for sale, and the factor sell them, the purchaser has a right to avail himself of the contract which the principal has authorized (*m*). But here the payment was not according to the contract. *Primâ facie*, a factor has no right to sell on his own account; if, indeed, the defendant had believed that the goods were B. and T.'s, there might be ground for the argument; but knowing that they belonged to a principal, if they believed B. and T.'s statement as to their right to dispose of the goods, they must take the consequence if B. and T. had no right. The case, therefore, is more like that of a broker: a broker has no right to sell, because he has not the *indiciæ* of property; here the factor disclosed that the goods were not his, and therefore the *indiciæ* were removed. [Lord *Abinger*, C. B.—*Ex vi termini*, a factor always sells goods for another.] A factor may be also a merchant, as in *George* v. *Claggett* (*n*), where the party sold the goods as his own. [Lord *Abinger*, C. B.—That is, he sold them in his own name.] Directly B. and T. disclosed that they were agents only, they became brokers. As to *Coates* v. *Lewes* (*o*), the party actually acted as factor, without disclosing any principal; and it was contended, unsuccessfully, that he could not be a factor, as he was a sworn broker. *Moor* v. *Clementson*, on the other hand, is strictly in point. In *Westwood* v. *Bell* (*p*), it was held, that the only question was, whether the party knew that his employer was only an agent. [*Parke*, B.—You contend, then, that the notice makes the defendant contract with B. and T. at his peril.] Just so; the laches lies with the defendant, none with the plaintiff. [Lord *Abinger*, C. B.—Have you any case to shew where, when a factor sold in his own name, and received payment before the day agreed upon, that on notice from the principal, that payment was held bad? Before the statute (*q*) passed the question frequently arose whether a factor could pledge? *Parke*, B.—The factors sell in their own name here. The question is, whether, on being told the goods belong to a principal, it puts the defendant to further injury.] It is submitted that it does; and the cases where the broker has been held entitled to his set-off has been where there has been a *del credere* commission. *Grove* v. *Dubois* (*r*), *Morris* v. *Cleasby* (*s*). [*Parke*, B.—You will find Lord *Kenyon* expressly says, that a *del credere* makes no difference (*t*).]

Cur. adv. vult.

Lord ABINGER, C. B., on a subsequent day in this term, delivered the judgment of the Court.—This case was tried before my brother *Parke* at *Liverpool*, in which the question was this:—The goods of the plaintiff were sold by factors at *Liverpool*, who have since become bankrupts; and the de-

(*m*) See *Favenc* v. *Bennett*, 11 East, 36.
(*n*) 7 T. R. 360.
(*o*) 1 Camp. 444.
(*p*) 4 Camp. 349.
(*q*) 4 G. 4, c. 83.
(*r*) 1 T. R. 112.
(*s*) 1 M. & S. 579.
(*t*) *George* v. *Claggett*, Peake's Add. Cas. 134; and see *Morris* v. *Cleasby*, 4 M. & S. 566.

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fendant having paid the factors, the question is, whether he was justified in paying him, and the jury have found that he was. If the question had been simply one of a factor selling goods in his own name, there would be no doubt on the matter; but the question here is, it appearing that the defendant was acquainted, at the time of the contract, that the goods belonged to a principal, and it appearing, at the same time, that factors always sell in their own names when they have a claim against the principal, and that these goods were sold in the factor's own name, whether the defendant was entitled to consider the factors as dealing with their own goods; and the jury have concluded that he was so entitled; and, on these facts, we do not see any ground for disturbing the verdict.

Rule discharged.

JENKS v. TAYLOR.

The Court will not allow a defendant to enter a suggestion on the roll to deprive the plaintiff of costs under a court of request's act, and at the same time make the plaintiff pay him the costs of an issue found against him.

IN an action to recover the sum of 3*l.* 15*s.*, defendant pleaded—1st, as to 2*l.*, a set-off; and, 2dly, as to the remainder, payment of 1*l.* 10*s.* into court, and *non detinet ultra*. The replication took issue on both these pleas; one of which was found for plaintiff, the other for defendant.

Humfrey now moved to enter a suggestion upon the roll to deprive the plaintiff of costs, and that the costs of the issue found for the defendant should be paid him by the plaintiff, and contended that the defendant was entitled to the suggestion, because he markets at *Birmingham*, used and frequented within the words of the *Birmingham* Court of Requests' Act(*a*), which the plaintiff knew, as he actually summoned him there for the debt; and that he also ought to have the benefit of Reg. Gen. Hil. T. 2 W. 4, as it has been held, that the defendant is entitled to the costs of the issue found for him, although those costs exceed the costs of the issue found for the plaintiff(*b*); and this application only goes a step further.

ALDERSON, B.—If you choose to keep the case in this court, you may do so; but if you take it out, you must take it with all consequences. You wish to take advantage of a rule of this court, but you say it ought not to be brought in this court. You must take it for good or for bad.

Rule *nisi* on the first point, and refused on the second.

On a subsequent day, *Erle* shewed cause against the above rule, which was discharged, on the ground that the using and frequenting *Birmingham* market, not being the mode in which he substantially gained his whole livelihood, did not bring the defendant within the words of the act.

(*a*) 47 G. 3, c. 14. (*b*) *Milner* v. *Graham*, 2 Dowl. P. C. 422.

MUSGRAVE *v.* NEWELL.

Exchequer.

The defendant, having reasonable and probable cause for suspecting that A. had made an assault upon him with intent to rob, gave him in charge to a constable. The constable stated that A. was a very respectable man, and not likely to have committed the offence. The defendant, however, persisted in his charge, and he was taken before a magistrate. In an action for malicious arrest, *Held*, that it was a misdirection to tell the jury that, if the defendant believed the good character given by the constable, and persisted in his charge merely from obstinacy, it put an end to the reasonable or probable cause for taking A. into custody.

THIS was an action against the defendant for "falsely and maliciously, and without any reasonable or probable cause whatsoever, before one *Griffith White*, Esq., then being the mayor of the borough of *Leeds*, in the county of *York*, charging the plaintiff with having, before then, made an assault on the defendant, in a certain king's highway, with intent the monies, goods, and chattels of the defendant, from the person, and against the will of the defendant, feloniously and violently to steal." The declaration then averred, that the justice, having heard the defendant's charge, dismissed the plaintiff out of custody, fully acquitted, &c.; and concluded with a general allegation of damages.

Pleas.—1st. Not Guilty. 2nd. Traversing that the plaintiff had received any damage in the words of the declaration.

At the trial, at the *Yorkshire* spring assizes, before Lord *Denman*, C. J., it appeared that, about one o'clock in the morning of the 12th *August*, 1835, the defendant was returning home on horseback, with a large sum of money in his pocket. When he got to a place called *Kirkstall Bridge*, he saw three men, of whom the plaintiff was one, standing together on the bridge, and as he rode by, at a sharp pace, one of them, *Buckle*, came forward, and made a rush at him, as if to stop him. The defendant rode sixty or seventy yards further on, and returned with a waggoner, whom he told to watch the three men while he went for a constable. The defendant returned in about a quarter of an hour, with *Slater*, a constable, and gave the three men in charge for making an attempt to rob him. When the constable saw the plaintiff, he told defendant who the plaintiff was, and that he was a very respectable man, and not likely to have attempted anything of the kind, and that he, *Slater*, would be bound for his appearance in 50*l*. It appeared also, that the defendant knew the plaintiff by his name, when he heard it mentioned; the defendant insisted, however, upon the constable taking the plaintiff into custody, which he accordingly did. When the charge was heard before the magistrate the next day, it appeared that the plaintiff, who was a respectable farmer, was waiting on the bridge with his servant for the *York* mail, and that *Buckle*, who was drunk, joined them some little time before the defendant came up. When they heard the defendant coming up, *Buckle* said, "Here is a man using his horse very ill, I will make him take his time," and rushed forward, as above stated. The charge was thereupon dismissed. Upon these facts, Lord *Denman* told the jury that, in order for them to find a verdict for the plaintiff, they must be of opinion that the charge of the defendant before the magistrate had malice in it, and was made without reasonable or probable cause; that as to the reasonable and probable cause, *in the first instance*, he thought there were sufficient grounds for suspicion; but that afterwards, when the constable told the defendant who the plaintiff was, and that he was a respectable man, if the jury should find that defendant believed the constable, whatever reasonable or probable cause there might have been at first, was put an end to by the explanation. As to the malice, although there was none in the usual sense of the word, yet, if the

jury thought that the defendant went on with the charge merely from obstinacy and feelings of wounded pride, after having received the explanation, and not with a view to the ends of justice, that was malice, in the legal sense, sufficient to support the action. The jury found a verdict for the plaintiff; damages 10*l*. A rule *nisi* having been obtained for a new trial for a misdirection,

Blackburn and *Milner* now shewed cause.—The learned judge told the jury the substance of the charge was, that the plaintiff stopped the defendant on the highway, and that the question for them to consider was, whether, *at the time* he made the charge, and after the information he had received from the constable, he had any reasonable or probable cause for so doing. [Lord *Abinger*, C. B.—Is it to subject a man to an action, that he has charged a person with felony, who gives an account in explanation which he does not believe? If all that occurs is only to induce persuasion in the mind, can that be said to act upon the reasonable and probable cause?] No; but if the defendant, having believed the statement, goes on with the charge, that shews a want of probable cause. [*Alderson*, B.—You seem to put it upon the malice, and not on the want of probable cause. The real question is, were the circumstances such as to induce a reasonable and probable cause for suspecting felony. If there were no probable cause, that would be strong evidence of malice; but I never heard that the existence of malice goes to deny reasonable and probable cause. The law on this subject is beautifully laid down in *Sutton* v. *Johnson* (*a*).] Suppose, in this case, the defendant had not made the charge for a year, having been perfectly satisfied his original suspicions were wrong. The learned judge left it to the jury, first, whether there was any reasonable or probable cause; second, whether there was malice. [Lord *Abinger*.—The lord chief justice put it to the jury that there was sufficient evidence of reasonable and probable cause in the first instance; therefore the only point for consideration is, whether he was right in putting to the jury that subsequent circumstances were to be taken into consideration of the reasonable or probable cause. *Alderson*, B.—There was a case in the Common Pleas, *Venafra* v. *Johnson* (*b*), in which the Court held that it was a question for the jury, whether the defendant believed the charge he made against the plaintiff.] That is precisely the manner in which the lord chief justice left the question to the jury here. The want of reasonable or probable cause was made up of a chain of facts, composing a mixed question of law and fact, and as such was properly left to the jury. *M'Donnell* v. *Brooke* (*c*). In *Nicholson* v. *Coghill*, (*d*) *Abbott*, C. J., said the questions of malice and absence of probable cause were properly left to the jury.

Cresswell and *Addison*, in support of the rule. The error of the lord chief justice arose from not keeping in view the distinction between malice and the want of reasonable or probable cause. A note to the case of *Purcell* v. *M'Namara* (*e*) points out the confusion that has arisen from considering them as synonimous terms. It is not correct to state that a judge may leave to the

(*a*) 1 T. R. 544,
(*b*) 10 Bing. 301.
(*c*) 2 New Cas. 219. S. C. 1 Hodges, 314.
(*d*) 4 B. & C. 21.
(*e*) 1 Camp. 199.

jury to decide as to the existence of reasonable or probable cause. He may tell them, if they find certain facts to be true, that they amount to probable cause; and so far it is a mixed question of law and fact. If Lord Chief Justice *Tindal* meant more than this in *M'Donnell* v. *Brooke* (*f*), it is not consistent with the former cases. [Lord *Abinger*, C. B.—Suppose, in this case, the defendant, having believed the plaintiff had attempted to rob him, on his return to the bridge, found that he was suffering with a broken leg or paralysis, and consequently unable to move, would not that be a destruction of the reasonable or probable cause?] The distinction there is, if the impression made on his mind had not arisen from the causes he supposed, that would do away with the probable cause; but here the facts exist as before, and all that is added is testimony as to the character of the person whom he charged. Lord *Denman* left it to the jury to say whether the defendant believed he had reason to make the charge; but as the facts were proved, that was not a question for the jury. Suspicious circumstances may induce a man, for the sake of public justice, to prefer a charge of felony against another, whom he may believe in his own mind to be innocent. In *Blachford* v. *Dod* (*g*), *Littledale*, J., said, "It was not a question of fact for the jury, whether the defendants believed that they had good grounds for indicting the plaintiff; but, all the material facts being ascertained, it was for the judge to say whether the defendants had reasonable or probable cause for so doing." *Venafra* v. *Johnson* (*h*) is easily reconciled. *Park*, J., at the trial, held that, on the words there used, there was reasonable and probable cause; but the real question was, whether the words amounted to a threat, and whether the defendant believed them to be a threat; and on those grounds the case was sent back for a jury to determine on. Here there was no dispute as to the facts constituting the reasonable or probable cause, and the defendant had a right to have the case determined by the tribunals of the country (*i*).

Lord ABINGER, C. B.—I am of opinion that, in this case, a new trial must be granted. It is a case certainly of some nicety; but there is no doubt as to the general principle of law regarding it. Since the case of *Johnson* v. *Sutton*, it has always been held that, to support this action, there must be both a want of reasonable or probable cause, and malice. The total absence of all cause would of itself be evidence of malice; but you can't infer from any degree of malice, the want of probable cause. In this case, the lord chief justice thought that the circumstances, as they stood originally, constituted probable cause; but he seems to have gone farther, and to have thought, that when the constable came up, and gave so satisfactory an account of the plaintiff, that the defendant's still going on with the charge constituted malice, and so to have left it to the jury; this we think is misdirection: if any other facts had come to light, so as to have altered the original transaction, that would have been different; but it was not so here. We all know that the highest character is occasionally found combined with crime. If the learned judge meant to say that the character given of the plaintiff by the constable altered the facts constituting the probable cause, I think this was a misdirection.

(*f*) 2 New Cas 217. S. C. 1 Hodges, 314.
(*g*) 2 B. & Adol. 179.
(*h*) 10 Bing. 301.
(*i*) But see *Revenga* v. *Mackintosh*, 2 B. & C. 693.; *Taylor* v. *Willans*, 2 B. & Ad. 845.

Exchequer.

MUSGRAVE v. NEWELL.

We cannot but say that reputation ought not to affect the reasonable or probable cause: but, on looking at his lordship's notes, he seems to have left it to the jury as to the malice alone. For, admitting that there was probable cause in the first instance, he told the jury to consider whether the defendant, having believed the constable's representations, did not go on from obstinacy and wounded pride. Suppose, in a case, there had been probable cause originally, but a subsequent fact arises, altering the previous circumstances, would that leave a probable cause? It struck me at first, as well worthy considering, if defendant was convinced of the truth of the constable's representations, whether that did not take away any probable cause. If it had altered the facts which formed the original probable cause, I think it would, as in the case I put to Mr. *Creswell*, of the man with a broken leg, where it was clear there was a mistake; but here the original facts remain unaltered; and I think it would be very dangerous to hold, that when the facts, which amount to probable cause, remain unaltered, a party should be subject to an action for going on with his charge. Suppose a man, under charge before a magistrate, receives an excellent character, I do not think the character can be said to alter the facts; it only affects the inference to be drawn from them. The probable cause would still remain, and the prosecutor would be justified in going on with the charge.

BOLLAND, B.—I am of the same opinion. The rule laid down in *Sutton* v. *Johnston* has always been approved of in *Westminster Hall*. Probable cause is a mixed question of law and fact. In *Venafra* v. *Johnson* (*k*), the question was, whether *Johnson* believed in the threat made by the plaintiff. The case here does not move on the same facts; for the learned judge held here that the admitted facts afforded probable cause.

ALDERSON, B.—The question was not correctly left to the jury. According to the opinion of the chief justice, the facts proved amounted to a reasonable and probable cause. When the defendant made the charge to the constable, the latter assured him of the good character of the party; and it appeared to the chief justice, if the defendant believed the constable, there was no longer any reasonable cause. In that I differ from him: the new fact ought either to alter the original state of facts, as they first appeared, or, if it do not alter, to be inconsistent with them. In the case put from the bench, of the man suffering under paralysis, such a fact would negative the possibility of his having made the attack in question. It would alter the original state of facts; but here the facts remain the same. The inference only is altered; and the facts remaining the same, the circumstances of suspicion still exist, though not so strong.

GURNEY, B., concurred.

Rule absolute.

(*k*) 10 Bing. 301.

MASON and another, Assignees of SMITH, *v.* SMITH.

Exchequer.

1. The Court will not interfere in a summary way to discharge a prisoner out of custody at the suit of the assignees of a bankrupt, although the bankrupt swears the debt was fictitious, and there is reason to think that it was so.
2. The application to the Court, to discharge a prisoner out of custody, should be made promptly. It is too late at the end of three months.

GODSON had obtained a rule, on a former day, *cor. Gurney*, B., calling on the plaintiffs to shew cause why the defendant should not be discharged out of custody on filing common bail, or why an *exoneretur* should not be entered on the bail-piece. The affidavit of the defendant stated that the bankrupt had acknowledged, by letter, having inserted fictitious debts in his books, and that he, the defendant, had been arrested for the sum of 2,930*l.*, although there was nothing due, as appeared by an account current in the handwriting of the bankrupt or his clerks; and it proceeded to state that the assignees had caused the defendant to be arrested in order to give evidence as to the bankruptcy. There was a letter also from the bankrupt to the defendant, who was his brother, acknowledging payment of all due to him.

V. Richards now shewed cause.—This rule was obtained on the authority of *Nizetich* v. *Bonacich* (*a*), and *M'Ginnis* v. *M'Curling* (*b*); but it is submitted, that the Court will not try a case of this sort on affidavits. The affidavits of the assignees state that, on examining the books of the bankrupt, a large balance was found due from the defendant; and they had no reason to suppose it was a fictitious debt. It is therefore a question, whether it be so clear that there was no fraud, or no debt, as to induce the Court to discharge the defendant out of custody; especially as the bankrupt and the defendant were brothers.

Godson, in support of the rule.—The assignees do not deny that the bankrupt told them the debt was fictitious; it therefore comes expressly within the case of *Nizetich* v. *Bonacich*.

ALDERSON, B.—What evidence is there that it is a fictitious debt? That letter, between two brothers, may be a fictitious payment. How are the Court to know, upon affidavits, that it is not a fictitious statement of payment?

PARKE, B.—I am disposed to think it is a fictitious debt; but it is quite clear your client has lent himself to it, and is therefore not entitled to relief. You want us to try the merits of a malicious arrest on affidavits. Besides, you should have applied more promptly, as your client has been in prison three months.

ALDERSON, B.—*Nizetich* v. *Bonacich* is an extreme case; and I should feel very much indisposed to adhere to it.

Rule discharged.

(*a*) 5 B. & Ald. 904. (*b*) 6 D. & R. 24.

Exchequer.

June 1.

ARCHBOLD *v.* SMITH, in Error.

It is not necessary for the sheriff to return two distinct panels to the writs of *venire facias juratores* and *distringas juratores*.

ERROR, *coram vobis*. It appeared, by the record, that issue had been joined between the plaintiff and defendant, in an action on promises; and that the plaintiff in error had let judgment go by default. The error assigned was, "that although a writ of *venire facias juratores* was sued out in this action by and on behalf of the said *William Wyke Smith*, to wit, on the fifteenth day of *April*, in the year of our Lord, 1834, and the same was then delivered to the sheriff of *Middlesex* to be executed; and also, although a writ of *distringas juratores* was sued out in this action by and on behalf of the said *W. W. Smith*, to wit, on the seventeenth day of *April*, in the year aforesaid, and the same was then delivered to the said sheriff of *Middlesex* to be executed; and although the said sheriff, in and upon the said writ of *venire facias juratores*, then made a certain indorsement in the words following, that is to say, 'The execution of this writ appears by the panel annexed.' And although the said sheriff, in and upon the said writ of *distringas juratores*, then made a certain other indorsement, in the words following, that is to say, 'The execution of this writ appears by the panel annexed;' yet, in fact, there is but one panel, and never has been more than one panel, and not two panels; one annexed to each of the said writs, as by law there ought to be."

Sir *W. W. Follet*, for the plaintiff in error.—The material point has been discussed in *Rogers* v. *Smith* (*a*). In that case there was no return made to the *distringas juratores*, nor any panel returned or annexed, and the omission was held to be error. Here there are two writs, the *venire facias* and the *distringas*, and only one panel returned. Under the statute 42 Ed. 3, c. 11, the return to the *venire facias* must be made before the trial; but the *distringas* is not returnable till the first day in *banc* after the trial; and it ought to shew what jurors were guilty of default on the day of *nisi prius*. The return, therefore, to the *venire* cannot be a return to the *distringas*. By the Jury Act, 6 Geo. 4, c. 50, s. 15, the sheriff, on his return of the *venire*, is to annex a panel of the jurors' names; and the section goes on to enact, that, in the *distringas*, it shall be sufficient to insert "the bodies of the several persons in the panel to this writ annexed named;" and provides that the names in the panel annexed shall be the same names as were returned in the panel to the *venire*. The statute, therefore, evidently contemplates that two panels are always to be returned. According to the practice in country causes, the return is made to the *venire* with the panel annexed; and at the trial, the sheriff returns the *distringas* with the panel annexed. In *London*, the practice is different. [Lord *Abinger*, C. B.—That is not so. The Court directs the writ to be returned, unless the judge come first into the county; and the usual course is, to have the panel annexed to the *venire* and the *distringas*. At the assizes, both are returned together: the practice is the same.] I understand, at the assizes, the sheriff makes another return to the *distringas*. It is admitted to be unimportant; but *Rogers* v. *Smith* shews that the omission is a fatal objection. [*Alderson*, B.—What is there, on the face of this record, to shew that the she-

(*a*) 1 Ad. & El. 772.

riff did not take the pin out of the panel, and put it in again, and so make a second return?]

Lord ABINGER, C. B.—The question turns upon this,—whether it be necessary for the sheriff to have two distinct panels annexed to the two distinct writs; or whether he may not annex the same panel to both writs? It appears to me he may do so; the judgment must therefore be for the defendant in error.

Judgment for the defendant in error.

BROWN *v.* JARVIS, Knt.

CASE against the sheriff of *Hants* for neglect in not executing a writ.

The declaration stated, that one *Benjamin Batten*, on the 29th day of *July*, A. D. 1834, was indebted to the plaintiff in a large sum of money, exceeding the sum of 20*l.*, to wit, the sum of 86*l.* 8*s.* 4*d.*, upon and in respect of certain causes of action before then accrued to the said plaintiff against *Batten*; and *Batten* being so indebted to plaintiff for the recovery of said debt, theretofore sued and prosecuted out of the court of our lord the now king before his justices of the Bench, against the said *B. Batten*, a certain writ of our said lord the king called a capias, directed to the sheriff of the county of *Hants*, &c. [*setting out the writ.*] And the plaintiff further saith that the memorandum, warning, and indorsement, required by the statute for the uniformity of process in personal actions in his majesty's courts of law at *Westminster* to be indorsed or subscribed to writs of capias, were respectively duly indorsed on or subscribed to the said writ. And the said plaintiff further saith, that the said writ, afterwards and before the delivery thereof to the defendant as such sheriff of the county of *Hants*, to be executed as is hereinafter mentioned, to wit, on, &c., was duly marked and indorsed for bail for a certain sum, to wit, 86*l.* 8*s.* 4*d.*, by affidavit, according to the form of the statute in such case made and provided; and that the said writ, so indorsed, *was afterwards, and within four calendar months* from the date thereof, including the day of such date, delivered to the said defendant, who then and from thence until and at and after the expiration of the said four calendar months, was sheriff of the said county of *Hants*, in due form of law to be executed; and the said plaintiff, in fact, saith, that the said *B. Batten*, at the time of the delivery of the said last-mentioned writ to the said defendant so being sheriff of the said county of *Hants* as aforesaid, and from thence for a long time, to wit, *until a certain, to wit, the 9th, day of October*, 1834, was within the said sheriff's bailiwick; and the said sheriff, during that period, and more than eight days before the death of the said *B. Batten* hereinafter mentioned, might and could have taken and arrested the said *B. Batten*, by virtue of the said writ, at the suit of the said plaintiff, if he would have done so, whereof the said defendant, so being sheriff as aforesaid during all that time, had notice, and was, during that time, and more than eight days before the death of the said *B. Batten*, to wit, on divers days between the time of the delivery of the said writ to the defendant as aforesaid, and the said 9th day of *October*, A. D. 1834, requested by the said plaintiff so to do.

That said defendant, so being sheriff of the said county of *Hants* as afore-

The duty of the sheriff, under the new writ of capias, is to arrest the party within a reasonable time.

Query, whether an action can be sustained against a sheriff for not arresting within a reasonable time, unless some damage can be shewn.

said, not regarding the duty of his said office, but contriving and intending wrongfully and unjustly to injure the said plaintiff, and to delay and hinder him in and from the recovery of his debt last aforesaid, did not, nor would at any time, before the 9th day of *October*, A. D. 1834, or within a reasonable time for that purpose, after the delivery of the said writ to him the defendant to be executed as aforesaid, (although a reasonable time for that purpose elapsed between the time of the delivery of the said writ and the commencement of the period of eight days next before the death of the said *B. Batten* as hereinafter mentioned,) take or cause to be taken the said *B. Batten*, as by the said last-mentioned writ he was commanded, but therein wholly failed and made default; and the said *B. Batten*, afterwards, to wit, on the day and year last aforesaid, being at large in the bailiwick of the said sheriff, to wit, on the 4th day of *October*, A. D. 1834, met with an accident, which he would not have met with if he had then been in the custody of the said sheriff; and by reason and in consequence of the said accident, the said *B. Batten* afterwards, to wit, on the 9th day of *October*, A. D. 1834, died, and by means and in consequence of the premises, the plaintiff hath been and is greatly injured and delayed in the recovery of his aforesaid debt, and is likely to lose the same; and thereby also the said plaintiff hath lost, and been deprived of the means of recovering his costs and charges by him paid, laid out, and expended in and about his said suit so commenced and prosecuted against the said *B. Batten* aforesaid, amounting together to a large sum of money, to wit, the sum of 10*l.*, to plaintiff's damage of 100*l.*; and therefore, &c.

Pleas—First. That *Batten* was not, at the time of suing and prosecuting against him the writ in the declaration mentioned, indebted to the plaintiff in a sum of money exceeding the sum of 20*l.*, in manner and form as the plaintiff hath above thereof complained against the defendant; and of this the defendant puts himself upon the country, &c.

Second. That defendant, from the time of the delivery to him of the said writ in the said declaration mentioned to be executed, until the time of the death of the said *Benjamin Batten* as in the said declaration mentioned, ever used all the diligence in the power of him the said defendant to take the said *B. Batten*, as by the said writ he was commanded; and this the said defendant is ready to verify. Issue was joined on these two pleas.

At the trial, at the *Hants* spring assizes, before *Littledale*, J., it appeared that one *Benjamin Batten* was indebted to the plaintiff in 80*l.* 4*s.* 9*d.* for a balance due on a promissory-note. The plaintiff, not being able to obtain the balance of the debt from *Batten*, on the 29th *July*, 1835, sued out a writ of capias against him, which was put into the hands of the sheriff's officer on the 30th. No return was made to the writ, although it was proved that *Batten* continued to carry on his business as a sheep-dealer at his residence at *Burgclere*, in *Hampshire*, in apparently solvent circumstances, and attended the different fairs in the neighbourhood during the months of *August* and *September*; and it also appeared that *Batten* did not know there was a writ out against him. On the 4th *October*, *Batten* had a fall from his horse out hunting, and died, in consequence of it, five days afterwards.

The learned judge was applied to at the trial to nonsuit the plaintiff, on the grounds, 1st, that the sheriff was not bound to take *Batten* for four months: and, 2ndly, that no notice was given to the sheriff's officer that *Batten* was

within his bailiwick (*a*). *Littledale*, J., reserved the points, and told the jury that if they were of opinion the sheriff's officer had not used due diligence in taking *Batten*, they were to find for the plaintiff; and in such case they were to say whether the plaintiff was entitled to more than nominal damages, and, if so, to what amount; that if *Batten* had been arrested, he might have done one of three things—have paid the debt, deposited a sum of money in lieu of bail, or put in bail; but as the action would have abated by *Batten*'s death, the bail would have been discharged from their liability, and the money taken out of court; and they were to judge whether it were probable *Batten* would have paid the debt on being arrested under the circumstances.

The jury found for the plaintiff, damages 40*l*.

Dampier having obtained a rule in *Easter* Term, calling upon the plaintiff to shew cause why he should not be nonsuited, or the damages reduced to nominal damages, or judgment be arrested,

Erle and *Crowder* now shewed cause.—In any case, if a capias issues, and the sheriff forbears to arrest, he is liable in damages. [Lord *Abinger*, C. B.—Suppose the man had not died, and the sheriff had been required to arrest, and he replies he will produce him at the return of the writ, what injury is there? At most you complain of a *damnum sine injuriâ*.] If the writ is returnable at the end of four months, and the sheriff tells the party he has a writ against him, and advises him to go abroad, the action would clearly lie. [*Abinger*, C. B.—That is a case of fraud.] Here is neglect, which is the same thing. If the sheriff had done his duty, we might have had judgment by default, or the party might have paid the debt. [Lord *Abinger*, C. B.—The sheriff's negligence is not the foundation of the action, unless some damage accrues. If you had suspected negligence, you might have ruled the sheriff to return the writ, and he would have returned *non est inventus;* but if, on the action for the false return, it appeared, by special circumstances, that you could not have maintained an action against the defendant, there would be no damage. Are you aware of the case of *Lewis* v. *Morland*, 2 B. & A. 56?] That was a case under the old writ, where the sheriff had to make a return by a day certain; by the new writ of capias given by 2 W. 4, c. 39, the sheriff is to return the writ immediately after the execution thereof, or, if the same remain unexecuted, "he is to return the same at the end of four calendar months from the date thereof, or sooner, if he should be required thereto by order of the court." The question, therefore, is, whether the sheriff may put the writ in his pocket, and do nothing upon it for four months. It was not necessary to rule the sheriff to return the writ, as the plaintiff has been damnified by the sheriff's failing to do his duty; *Jacobs* v. *Humfrey* (*b*). It was the sheriff's duty to arrest the party, and we might have had possession of his body for two months and five days. He might have paid the debt immediately; he might have been a bankrupt; and, consequently, the priority of execution would be most important. All these are questions of fact, not of law. [*Alderson*, B.—They are questions of fact which you have not proved. You have

(*a*) This and another point were made at the trial, but the Court refused a rule nisi upon them.

(*b*) 2 C. & M. 413; 4 Tyrr. 272, S. C.

not suggested any damage.] There is a distinction between a breach of duty by a private individual and a public officer. Actual damages form the gist of the action against the former; but against the latter an action lies, although there is no damage proved, as the Court will presume it. *Barker* v. *Green*(*c*), *Bates* v. *Wingfield*(*d*). [*Alderson*, B.—The cases you cite are breaches of duty with damage.] There is necessary damage here in not getting the arrest. If it should be held, that the sheriff is not liable unless he has been ruled to return the writ, he need never do anything for four months. But where no time is mentioned in which a thing is to be done, the law always intends it should be done in a reasonable time. The writ does not mean that it is to be returned at the end of four months, but at any time during the four months, and not afterwards. It was left to the jury whether the sheriff was negligent or not, and the jury have found he was. [*Alderson*, B.—But is not death such an event that it reduces the damages to what by some possibility might have happened, that is, to mere speculative damages.] That is often the case; as, in injury to ancient lights, it is impossible to shew the actual damage done. [*Alderson*, B.—There the party proceeds on his right, and that is actual damage.] We proceed on our right to the arrest, and we shew delay by the sheriff. [*Alderson*, B.—I think you must exclude speculation on both sides. If you shew delay, it is not to be inquired into whether the party might have died, or whether he might have paid the debt on being arrested.] As to arrest of judgment, the same argument applies, as it is said we have stated a discontinuance on the record, but that depends on the question, at what time is the sheriff bound to execute the writ.

Dampier and *White*, in support of the rule.—We are entitled to a nonsuit, because there are only speculative damages alleged; to arrest of judgment, because there is no return stated to the writ. [*Alderson*, B.—How can there be a nonsuit? there are only two issues, both of which are found against you, and rightly. Suppose you had let judgment go by default, there must have been a sheriff's jury to assess the damages; and I don't see how it varies it that you have pleaded two pleas, both of which are found against you.] In arrest of judgment, the sheriff is only liable for negligence in not executing process in cases where he may be attached; but he cannot be attached unless he has been ruled to return the writ, at least before the Uniformity of Process Act. In *Morland* v. *Leigh*(*e*), Lord *Ellenborough* nonsuited the plaintiff because there had been no return to the writ, and on the record no return appears. The sheriff's return is the only answer the Court can receive. By the forms of pleading, the return-day is always stated, as in *Barker* v. *Green*(*f*); and the suggestion against the sheriff is, "*ad largum ire permisit, et non comperuit ad diem.*" In *Bates* v. *Wingfield*(*g*), no return-day was necessary. [*Crowder*.—There are precedents which do not state the return-day. 8 Wentw. 486; *Raymond* v. *Bridges* (*h*). (*i*) *Alderson*, B.—I don't think those precedents have any thing to do with it. The question is, whe-

(*c*) 2 Bing. 317.
(*d*) 2 Nev. & Man. 831.
(*e*) 1 Star. C. 388.
(*f*) 2 Bingh. 317; 2 Chitt. Pr. 4th ed. 739, 40.
(*g*) 2 Nev. & M. 831.
(*h*) Loft. 69.
(*i*) See the precedent for an escape on the new writ of capias, 2 Ch. Pr. 518, 6th ed.

ther the new act does not alter the responsibility of the sheriff.] The act is only for the uniformity of process, and does not at all alter the duties of the public officers named in it. The act makes it optional on the plaintiff to fix the day of the return; if he suspects negligence, he must rule the sheriff, and then he will have his action for the false return, but his duty is to watch his writ. If the party had been alive at the end of the four months, the plaintiff could not have brought his action against the sheriff, unless he had ruled him. [*Alderson*, B.—Suppose the sheriff had executed the writ, but had omitted to return it, and the plaintiff had received damage by the omission, could he not maintain an action? If you admit that, then if the Uniformity of Process Act makes the return day determinable on the day of arrest, and orders the sheriff to arrest, does not that throw on the sheriff the duty of arresting within a reasonable time?] It is submitted that it does not. The return day is always necessary to be stated, and the statute gives the plaintiff the power of fixing that day.

Cur. adv. vult.

Lord ABINGER, C. B.—This was an action which charged the defendant with negligence, in not arresting a party at the suit of the plaintiff; and the pleadings state that, by reason of his not arresting him, an accident occurred to the defendant which he would not have met with if he had been in custody, and by reason of which accident he died.

When this case came on to be decided on a motion for arrest of judgment or a new trial, the Court heard a long argument, whether any damages could be recovered on the facts of the case; but as it turned out that there was no general issue pleaded, the argument fell to the ground. The only pleas were, first, that the defendant in the suit was not indebted to the plaintiff; and the second was, that the sheriff had been guilty of no negligence; and these issues are found against the defendant. The question was, whether the jury were to assess any, and what damages. The jury have found 40*l.*, which we think very unreasonable; and it seems the plaintiff will be contented with nominal damages. If it had appeared on the face of the declaration, that the sheriff had made an attempt to execute the writ, and failed, in that case, the judgment must have been arrested. I do not apprehend that an action could be maintained, unless some specific injury could be shewn; but in this case the declaration alleges the defendant named in the writ would not have died, if the sheriff had done his duty and arrested him; and however improbable that may be, there is no plea here to deny it; and as the declaration stands, we must take it for granted that he would not have died if the sheriff had arrested him; so that it does appear there has been some degree of negligence on the part of the sheriff, and a damage to the plaintiff thereby; for that the sheriff is liable. We think, therefore, the judgment cannot be arrested, and the plaintiff must have a verdict for nominal damages.

Another question agitated was, that the new form of the writ being returnable immediately on execution, the return of the writ must be set forth in the declaration; and that the sheriff is not liable to an action if he did not return it till the four months expired. We are of opinion the duty of the sheriff under the new form of writ is to arrest as soon as he can, and for any neglect in so doing, an action lies against him in virtue of that negligence. We

Exchequer.

BROWN v. JARVIS.

think, therefore, the judgment in this case cannot be arrested: the rule for an arrest of judgment will be discharged, and a verdict entered for the plaintiff for forty shillings.

Rule discharged to arrest judgment; absolute to reduce the damages to 40*s*.

DOE d. the Marquis of HERTFORD *v.* HUNT.

Where a tenant gave his landlord notice to quit at *Michaelmas*, 1835, and subsequently made an offer to remain another year, to which the agent of his landlord replied, that H. (the landlord) has directed me to inform you that he could only consent to accept your offer of 420*l*. for the farm from *Michaelmas* next to *Michaelmas*, 1836, subject to the existing covenants, provided I could not find a tenant at the rent it appeared to me to be worth by the 1st of *August*; the tenant having assented to these terms:—*Held*, that if the above amounted to a substantive agreement at all, it was an implied condition on the part of the tenant to allow any one wishing to take the farm to go over the land, and the tenant having refused to do so, the agreement fell to the ground, and the notice to quit at *Michaelmas*, 1835, remained good.

EJECTMENT for a farm. At the trial before *Gaselee*, J. at the last assizes for *Suffolk*, it appeared that the defendant had been tenant to the lessor of the plaintiff, of a farm, at the rent of 520*l*. per annum; and that in 1834 the defendant, not being able to obtain a reduction of the rent, had given notice to quit at *Michaelmas*, 1834, but it was agreed that he should hold on till *Michaelmas*, 1835, at a reduced rent, when the notice to quit was to take effect. In the spring of 1835 the defendant made another application to Mr. *Wickens*, Lord *Hertford*'s agent, to become tenant of the farm, at the rent of 400*l*., upon which the agent, after consulting Lord H., wrote as follows:—"The Marquis of *Hertford* has directed me to inform you, that he could only consent to accept your offer of 420*l*. for the farm, for the year from *Michaelmas* next to *Michaelmas*, 1836, subject to the existing covenants, provided I could not find a tenant for it, at the rent it appeared to me to be worth, by the 1st of *August*; and subject as well to the express understanding, that the notice you had given to quit your farm at *Michaelmas* next, should be admitted between you, not to be withdrawn, but to be carried over to *Michaelmas*, 1836." The letter also stated, that the farm would be advertised to be let at *Michaelmas* next, which was accordingly done. The defendant, on the 9th of *July* following signed this memorandum:—"Mr. *Hunt* has explained that his offer for the farm was 400*l*. only, and subject to this condition, he assents to the terms proposed in Mr. *Wickens*'s letter. *T. Hunt*." It was also proved that a farmer of the name of *Catlin* was desirous of taking the farm; but as the defendant would not allow him to go over it, he made no offer. On these facts it was contended, for the defendant, that the tenancy existed till *Michaelmas*, 1836, as the plaintiff had not found a tenant for it at a higher rent, and a nonsuit was applied for, which the learned judge refused, but reserved the point.

Storks, Serjt, having obtained a rule accordingly in *Easter* Term,

Kelly and *Gunning*, in this Term, shewed cause against the rule.—The tenancy having expired, the intention of the parties is to be got from the letter only. By that Lord *Hertford* agrees to continue the tenancy, if he could not find another tenant, and the tenant agrees to let Lord *Hertford* come on the land to see the capabilities of the farm. [Lord *Abinger*, C. B.—The difference is, that one condition is expressed, but the other is only implied.] But it is necessarily implied, as no one would agree to take a large farm without coming on the land. [*Alderson*, B.—Is it certain that it is an agreement at all, or that it amounts to more than a proposal for an agreement?] It

may be contended that that is all it amounts to. The Court then called upon

Storks, Serjt., who with *B. Andrews* supported the rule. The question here is a bare point of law; and the learned judge who tried the cause was of opinion that the lessor of the plaintiff had given no evidence of having complied with the conditions of the agreement. It was incumbent on the plaintiff to shew that some one would have given more than 420*l.* a year for the farm, before the defendant was bound to let him go over the land; and it was not necessary to do so in order to take the farm. In *Watson* v. *Waltham* (*a*), Lord *Denman*, C. J. held, that a power of entry was not necessary for the purposes of selling. The defendant bound himself as tenant the instant he signified his assent; and being so bound, it was mutual, and Lord *Hertford* must shew that he has complied with the provision. The agreement only is to be looked at, as at common law a tenant is not bound to let his landlord enter on the land.

Lord ABINGER.—I am of opinion this rule ought to be discharged. The agreement is not very formal, and is evidently not drawn up by a lawyer. It is an intimation by the agent of the marquis to the tenant, in the form of a letter, respecting a proposal made by the tenant; and that intimation is plain. "I cannot accept you as a tenant permanently at the rent of 400*l.*; but I am willing you should remain to *Michaelmas* next, but that is only on the condition that, in the meantime, up to the first of *August*, I should have an opportunity of knowing whether I can let the farm more to my satisfaction." Suppose, in answer to that, Mr. *Hunt* had said, "No; I won't consent to that;" then there is no doubt there would have been an end of the agreement. But, from the form the letter takes, it looks as though it were a substantive agreement on both sides, though not actually acceded to at that time; for *Hunt* was to be at liberty to say "I won't accept these terms at all;" the intimation, therefore, of his opinion is not binding on this occasion, and the contract is open. But the agent has put it into such a form, as if it were a conditional agreement on both sides, if a tenant should not be got by the first of *August*, then he was to remain in possession of the farm for a year. Now, if *Hunt* understood it was a positive agreement, binding upon him from the first of *August*, then he must have understood also the condition, which was, that the landlord, in the meantime, was to endeavour to get a tenant. And then the question is, if the condition is one which he himself prevents the landlord from performing, is he to be at liberty to take advantage of this breach of the agreement? I apprehend it implies that the landlord will take the usual means of letting the farm; and if *Hunt* meant to prevent his doing that, he should have so stipulated at the time the agreement was made. He might have said, "I will not consent to let anybody look at the farm." He does not do that; but, before the first of *August*, it is found he does not mean to let anybody look at the farm. If he is cognizant of the full meaning of the agreement, he is practising a fraud. This may be illustrated by this case:—Suppose the landlord had said "I agree to accept you as tenant for one year, provided my surveyor reports to me the house and farm buildings are in a good and tenantable condition; and then, after consenting to this, when the

(*a*) 2 A. & E. 485.

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landlord sends his surveyor, the tenant says, "No; I won't allow you to go over the premises; I shall lock my gate;" would he be allowed to say the condition stipulated for was, that the surveyor should make a report, but that he was not bound to let the surveyor in? How can you expect a farmer to take a farm without having first seen it? The usual mode is by visiting, by yourself or others; and it must have been understood by both parties that that mode would have been adopted. I believe there is hardly an instance to be found, in any lease, to provide that, for the last half year before the lease expires, the tenant shall be bound to let any individual, wishing to become a tenant, to look at the premises. There are stipulations undoubtedly to the effect that the landlord should be allowed, during the last year, to come on the land, for himself or the in-coming tenant, in order to sow and prepare a crop; but I have never seen such a clause as this, that where a landlord is about to let a farm, a person should come on the premises and look at it; it is so fully understood. It appears to me to have been, manifestly, an implied part of the condition that an in-coming tenant should look at the farm; and the moment the defendant intimates he would not allow it, the contract is at an end. Suppose that he had brought an action on this contract, he must have shewn he himself had faithfully performed it. Then, suppose the landlord had had an opportunity of getting a tenant at a rent of more than 400*l.* a year, but who had been obstructed on going to look at the farm, in consequence of which he declined becoming the tenant, could he have recovered on that? I think not. Then, before the first of *August*, there is a departure from the contract, entered into between the agent, the landlord, and the tenant; and we think, from that moment, the contract ceased. We think, therefore, there is no occasion for a new trial.

BOLLAND, B.—I am of the same opinion. It was a condition precedent, that he should allow persons to inspect the farm, in order that they might see whether it would be worth the original sum *Wickens* had asked for it, namely, 520*l.* a year, or that which he might ascertain from communications with persons afterwards. There was a large space between 400*l.* and 520*l.*; but how could it be ascertained what the farm was worth, unless the parties, who might wish to bid for it, might be at liberty to go over and view it. But then it is said, on the part of the defendant, that, to a person living contiguous to this farm, as Mr. *Catlin* did, it was not necessary for him accurately to look over the farm in order to enable him to make an offer. But it appears, from the letters of *Catlin*, he did mean so to do; for he writes, saying he would go over the farm without him. But *Hunt* says "No;" so that *Hunt* was to have the whole of the contract completely in his hands; or, in other words, he is to say, "I have entered into an agreement to take this farm for 400*l.*, unless you can get a better offer; and I will take very good care you get no more for it."

ALDERSON, B.—I am of the same opinion. It appears to me that there really was no agreement at all. When you take the whole evidence together, the thing is plain enough. The defendant makes a communication to *Wickens*, wherein he states he will not waive the notice he has previously given; which was, in truth, a notice for him to quit at *Michaelmas*, 1835, unless the marquis will permit him to occupy the farm at a reduced rent of 400*l.* a year; and,

upon that condition, he says "I will consent to waive my notice, and go on, and hold your farm." That is the proposal the defendant makes to the marquis's agent. The answer of the marquis by his agent is, "I will not consent to let you go on at a rent of 400*l.*; that I absolutely refuse; but I will try to let the farm, until the first of *August* next, for such a sum as Mr. W. says it is worth; and if I cannot let it by the first of *August* next, then, in that case, I will permit you to occupy it for one year more if you then choose to waive your notice." In the intermediate time, the defendant will not allow that to be done which the agent stated to be a condition precedent to his allowing him to live on the farm for one year. Under these circumstances, they stand on their original rights; and the defendant, not having allowed the marquis to act on the condition, he must give up the farm on receiving notice to quit.

Rule discharged.

PALMER *v.* WALLER, executors, and another.

June 10.

In an action against executors, if they plead over, and the verdict pass against them, production of the judgment-roll on a *scire fieri* inquiry before the sheriff is sufficient *primâ facie* evidence of assets to find a *devastavit*.

THIS was an action on a promissory note against the defendants as executors. The defendant pleaded, first, that the testator did not make the note; secondly, that it was as to part an accommodation note; thirdly, as to the residue, payment. All the issues were found for the plaintiff, who thereupon issued a *fi. fa. de bonis testatoris si*, &c. *si non de bonis propriis*, to the sheriff of *Norwich*, and upon a return of *nulla bona*, sued out a *scire fieri* inquiry to the sheriff of *Norwich*, where the defendant resided. At the *scire fieri* inquisition the plaintiff produced the judgment-roll in the cause as evidence of a *devastavit*, and *Erving* v. *Peters* (*a*) was cited, but the sheriff said it was strange he should have to decide upon a point of law, and directed the jury to return that the defendant had not been guilty of a *devastavit*.

J. Jervis having obtained a rule on a former day in this term, calling upon the defendants to shew cause why the sheriff should not amend the return, or why there should not be an attachment for a false return,

B. Andrews now shewed cause, and contended that this was an *ex parte* proceeding before the sheriff, and that the mere production of the judgment-roll did not shew assets.

J. Jervis referred to *Leonard* v. *Simpson* (*b*), as directly in point, and

Per Curiam.—Surely the judgment-roll was sufficient proof of assets for the sheriff, and that was uncontradicted (*c*).

Rule absolute.

(*a*) 3 T. R. 185.
(*b*) 2 N. C. 176.
(*c*) See 2 Chit. Arch. Pr. 758-9, as to the mode of proceeding against executors by *scire fieri* inquiry, and the 3 & 4 W. 4, c. 42, which gives costs in such inquisitions, whether the executors appear or not.

Exchequer.

DOE d. SPENCER *v.* PEDLEY and another.

Where a testator made several devises to his nephew, J. S., to his brother, J. S., and to the sons of his brother, J. S., for life, remainder to their children, and by a residuary clause devised the rest of his real property not before disposed of, and concluded his will with these words, "I also entail my land to the S's. male heir so long as one shall remain:" *semble*, per *Abinger*, L. C. *B.* and *Parke*, B. that these words are not a sufficient *designatio personæ* to point the individual to take.

The testator held premises to himself and his heirs *pur autre vie*, and after having, by a residuary clause, devised the same to his wife and her heirs, he added this clause, "I do further give unto my wife" the premises in question:—*Held*, that although the last clause by itself would give the widow only a life estate, it shewed no such repugnance to the residuary clause as to cut down the estate in fee given by it.

If a will contains passages cancelled by the testator, they cannot be called in aid to explain the remaining parts of the will, but it must be read as if the cancelled passages were a blank.

EJECTMENT. This case came on in the Court of Common Pleas at *Lancaster*, before Lord *Denman*, C. J., but parties having agreed to state the facts of the case, the following special case was drawn up for the opinion of the Court.

On the 9th of *October*, 1804, a lease was granted by the Earl of *Derby* to *John Spencer*, his heirs, and assigns, of certain lands for three lives, and the life of the survivor. He entered under the lease, and in *December*, 1820, made his will, of which a fac-simile copy was set out. After directing his funeral expenses, debts, &c. to be paid out of his personal estate, and, in default of the personalty, out of his realty, he proceeded: "I do hereby give and devise to my nephew, *John Spencer*, otherwise *Holt*, the natural son of my sister *Betty*, and to his heirs and assigns, [*all that cottage or dwelling-house in which he now resides, situate in* Redvales, *aforesaid, for and during the term of the natural lives, by which I hold the same under the Earl of* Derby, *to enter thereupon from the day of my decease, and I do hereby also* (*a*)] give and bequeath unto the said *John Spencer*, otherwise *Holt*, and to my brother, *James Spencer*, all those messuages, cottages, and dwelling-houses, with the appurtenances to the same respectively belonging, situated at *Bedlam Green*, within *Bury*, aforesaid, to hold the same unto the said *John Spencer*, otherwise *Holt*, and *James Spencer*, their executors, administrators, and assigns, equally as tenants in common, to enter thereupon immediately after my decease." Then followed a devise of a house to one *Alice Cheetham*, in fee, subject to the payment of 100*l.* to his wife. Then a legacy of 1000*l.* to his wife, to be paid out of his personalty, and in default of the personalty he charged it on certain premises situated at *Wrigley Brook*, within *Heywood*, aforesaid; and he gave her all his household, and other goods and furniture, beds, and bedding, plate, linen, and china, to and for her own use and benefit absolutely; he gave and devised all those two messuages or dwelling-houses, with the building, land, and premises thereto belonging, situate at *Cut Gate*, within *Spotland*, to his wife, for and during the term of her natural life; "and in case my nephew, the said *John Spencer*, otherwise *Holt*, should survive my wife, then immediately after her decease, I give and devise the same to the said *John Spencer*, otherwise *Holt*, and his assigns, for and during the term of his natural life; and immediately after the decease of the survivor of them, my said wife and nephew, I do hereby give and devise the same unto and equally to be divided amongst the children of my said nephew, share and share alike, and their respective heirs, as tenants in common." There was an executory devise over to the sons of his brother, *James Spencer*, for life, remainder to their children. He then devised to his widow, certain messuages and dwelling-house at *Wrigley Brook*, with the outbuildings, gardens, and lands, for her life, remainder to

(*a*) "The words within crotchets were scored through; and it was admitted that the words scored through were struck out by the testator immediately before executing his will, and described the premises in question, subject to the question of the admissibility of any evidence to this effect to affect the construction of the will.

her natural son, *James Ogden*, otherwise *Speneer*, for life, remainder to his nephew, *John Spencer*, otherwise *Holt*, for life, remainder to the children of *John Spencer*, and in default of issue, he devised the same to the sons of his brother, *James Spencer*, for life, remainder to their children. He devised a farm to his widow for her life, remainder to his natural daughter, *Mary Ogden*, for her life, remainder to the sons of his brother *James*, with a similar limitation. He devised a messuage, cottage, or dwelling-house, with its appurtenances, to his widow for life, remainder to his niece for life, remainder to his brother *James*'s sons, as before. And the will concluded thus:—"*And all the rest, residue, and remainder of my messuages, buildings, land, hereditaments, and premises*, and all my personal and other estate and effects, *not hereinafter disposed of, I do* hereby give, devise, and bequeath, unto my wife, *Ann Spencer*, her heirs, executors, administrators, and assigns, for ever, or for and during all my estate, right, title, and interest therein (*b*).

"[I do further give unto my wife, this house wherein I now live, also the cottage, and all the building, cattle, and every thing belonging to me in and about this house, *Redvales*. I also make my wife sole executor, and at her decease, my (*c*) *Jane Spencer;* I also entail my land to the *Spencers'* male heir [*sic*], so long as one shall remain."]

The testator died on the 27th of *December*, 1820, and *Ann Spencer*, his widow, entered into, and, until her death, remained in possession of *Redvales*, the premises in question, and devised all her estate and interest in them to the defendants.

In *October*, 1835, she died.

George Spencer, the lessor of the plaintiff, is the heir at law, and next of kin of the testator, *John Spencer;* and one of the *cestui qui vies* named in the lease is still living.

The question for the opinion of the Court was, whether the said *Ann Spencer*, under the will of the said testator, *John Spencer*, took the whole estate and interest which he had in the premises in question.

The case was argued in this term, by

Cresswell, for the lessor of the plaintiff.—Under the specific devise of the premises in question, the testator's widow took only an estate for life; and the remainder of the estate, *pur autre vie*, not being disposed of, the plaintiff is entitled to it as a special occupant. Reliance, perhaps, will be placed on the residuary clause; but at the time of making that residuary clause, the testator had devised the premises in question, although he afterwards struck out that first bequest. [Lord *Abinger*, C. B.—We can't look at the will as if it had that expunged clause in it at all.] The act of the party in inserting that clause, is in the nature of a contemporaneous act, and may be referred to, to explain writing which may be otherwise ambiguous. [*Parke*, B.—No matter what took place at a former period; the question is, what the words now in the will mean, and you must read the paper as if that clause were blank.] When two parts of a will are clearly inconsistent, it has been held repeatedly that the latter is to stand (*d*); *Shepherd's Touchstone*, *Sims* v. *Doughty* (*e*), *Constantine* v. *Constantine* (*f*). [Lord *Abinger*, C. B.—It is a fallacy to say that the clauses are

(*b*) The words within brackets were inserted by the testator in his own hand, immediately after striking out the words struck out before executing the will, and describe the premises in question.

(*c*) "So in the original."
(*d*) Ed. *Preston*, p. 402.
(*e*) 5 Ves. 243.
(*f*) 6 Ves. 100.

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inconsistent.] If the specific devise is taken without the residuary clause, it is clearly an estate for life only. *Doe d. Tofts* v. *Robinson* (*g*). But the residuary clause coming before the specific devise gives an estate of inheritance, which is clearly inconsistent with the estate subsequently given. There are cases where, on an estate for life not being well disposed of, it has been held, that a subsequent residuary clause gives all the interest of the testator; but in such cases there is no inconsistency, as the testator's intention may change in the course of his will. But the converse is not so; and there is no instance where a preceding clause in a will, giving a larger estate, has been called in to explain a subsequent clause, giving a smaller. In order to give effect to all the words of the will, this property must be taken out of the residuary clause, which then operates as a good devise of all the preceding property mentioned; and then the last clause of the will gives the premises in question after the life estate to the heir of the testator. That such words are sufficient to create an estate tail, appears from *Corenden* v. *Clarke* (*h*). [*Parke*, B.—You make that clause, then, amount to a revocation of every previous devise in the will.] Suppose a testator gives an estate in fee to A., and then by codicil gives it to B., without more, why is not that a revocation? [*Parke*, B.—You must take the usual meaning of the words in both cases.]

Coltman.—There are two objections to the construction last contended for. First,—Uncertainty as to the person who is to take as the *Spencers'* male heir. Secondly,—Houses do not necessarily pass under the designation, land (*i*), *Heydon's* case. Throughout the will the testator is specific, when he devises houses and when he devises lands; it shews, therefore, he knew how to express the distinction. It is difficult to say what lands the testator meant in the last clause. Probably, having given a quantity of land to the sons of his brother successively, he meant to impose a limitation on them which the law will not allow. If that is not the construction, it is quite uncertain to what lands it does apply. So as to the *Spencer's* male heir, he probably meant some of his family, but that is not a proper designation.

As to the opposition between the residuary and the specific clauses, the supposed inconsistency rests only on this, that the testator must have known the state of the law long before it was known to the profession, as it was not until the case of *Doe* d. *Teffs* v. *Robinson*, that the devisee of an estate *pur autre vie* was held to take an estate for his own life only. It is said there is no case where a residuary clause has been held to prevail, when followed by a specific devise, nor, it may be answered, is there any case to the contrary. Though a partial estate is given in one clause, and a residuary clause follows, giving the general interest of the testator, the residuary clause has been always held to carry every thing not otherwise devised, except in one instance (*k*), where, after a specific devise, the remainder was limited to the heir at law, which is really no exception. The cases are collected in 2 *Jarman's Powell* (*l*), and the result is, that the residuary clause conveys all the interest undisposed of, unless, in the words of Lord *Eldon*, "there is something like a declaration

(*g*) 8 B. & C. 296.
(*h*) Hob. 29.
(*i*) 2 *Jarman's Powell*, 187. *Heydon's* case, 2 And. 123.
(*k*) See 2 Jar. Pow. 108, and the authorities collected in the note.
(*l*) Vol. 2, p. 102, et sqq.

plain to the contrary" (*m*); and this rule of construction was adopted by Lord *Tenterden*, in *Doe d. Moreton* v. *Fossick* (*n*).

Cresswell, in reply.—*Heydon*'s case (*o*) is relied upon for the position that houses will not pass under the word lands; but there the words of the testator were, "I bequeath all that my house, lying in *Launton*, in the county of *Oxford*, with all other my lands, meadows, pastures, with all and singular their appurtenances whatsoever, lying in *Watford*, in the county of *Hertford*, to W. E.;" and it was held, that a house in *Watford* did not pass under the devise, but there the testator clearly distinguished between his houses and his land. But how can it be said that under the words, "I entail my land," that any distinction is made?

Nor is there any uncertainty as to the person who is to take as male heir; for, as his nephews are to take for life, and their children would take in fee, it is clear that the testator meant it to his own male heir, probably thinking it right not to fritter away the estate. Then, as the specific clause gives only an estate for life, and the preceding clause gives the remainder in fee, as the two clauses cannot stand together, the words must be taken as put in by the testator, and the latter only be given effect to.

Lord ABINGER, C. B.—I am of opinion that the defendants are entitled to take this estate. As to the last clause, if it had been sufficiently clear, the Court would have been bound to give effect to it, however inconsistent it might be with the other devises in the will; but it appears to me, that that clause is not clear enough to have effect given to it. For, in the first place, there is no sufficient *designatio personæ*, as *Spencer*'s male heir may be the heir of *John Spencer*, or the heir of *James*, or his own heir, and therefore it is too ambiguous for a Court to act upon. It is probable he intended to do what the law will not permit: he meant, so long as the *Spencers* should continue, that the land should not go out of the family. We then come to the next question, whether the devise to his wife of a life interest in the premises in question, is so inconsistent with the preceding clause giving her the larger estate, that we must consider it as a revocation. It appears to me that the plaintiff rests on this fallacy, that as the rule is that when a testator makes a devise, and then another clearly repugnant, so that by no construction can they stand together, the latter clause only is to have effect; but that rule is only applicable to cases where there is a clear repugnancy between two clauses; and another rule of construction adopted by the Courts is, that if you can't find the testator's intention clearly expressed in legal language in the will, they do not allow the words to give more than an estate for life, although in most of the cases the testator clearly intended to give a larger estate. But we can't, from that rule, infer that the words in these clauses shew different intentions, or are inconsistent with one another. It might be that the testator doubted whether he had given his wife what he intended to give her, and then repeated his devise. That is not inconsistent. It is at most an unnecessary repetition. I waited to hear if there were any case to shew that where a testator has given an estate to his heirs for ever, and then a clause follows giving

(*m*) Cited in 2 *Jarman's Powell*, 119.
(*n*) 1 B. & Adol. 186.
(*o*) 2 Ander. 123.

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a life estate to the same parties, these clauses had been held to be inconsistent; and in the absence of any such case, we must give effect to the whole of the will; and we cannot imply any intention in the testator to cut down the estate he had previously given.

PARKE, B.—I entirely concur. The first question is, whether the use of the words, "I entail my land to the *Spencer*'s male heir," makes any difference in this case. The words certainly are obscure; there is a difficulty to say what he means by the word land, and it is also difficult to say whom he means as the *Spencer*'s male heir. It is enough for the Court to say, either that the words are so obscure that they cannot be given effect to, or that they apply only to the land devised to the *Spencers*. The words may have the effect of making the devise to the *Spencers* an estate tail, or may have been intended to prevent them from alienating; but unless the words relate to the premises at *Redvales*, they cannot affect the present case.

Then the other question arises, whether the additional clause, after leaving the residue to his wife, limits that residue to a life estate. There is no doubt that when the testator put his name to the will, the whole must be taken together, and no part is to be rejected which can be reconciled; and that where two clauses cannot be reconciled, the last only is to be taken. The question, therefore, is, whether these two clauses are so irreconcileable. The first gives to his wife all the rest, residue, and remainder of his messuages, lands, &c. not hereinafter disposed of; the second clause gives her the house, &c. wherein he then lived; and it appears to me that these clauses are by no means inconsistent. It is true, if the words stood alone in the last clause, there would be nothing to give them effect in passing the fee; but I look at the other clause, and find they can be reconciled. If the words had been, "I leave to my wife, for life *only*," that would have been inconsistent with the residuary clause, but that would arise from the use of the word only. I am therefore of opinion, that the wife, under these two clauses, took an estate in fee.

BOLLAND, B.—I am of the same opinion. There is no doubt the residuary clause would pass the estate to the wife; and the question is, whether the following clause can vary the effect in point of law, when no different intention is shown by it. A great deal of learning on these matters is to be found in *Williams* v. *Thomas* (*p*), where Lord *Ellenborough* said it was unnecessary to cite cases for the position, that a devise of the residue absolutely passed the fee, although heirs were not mentioned. The question here is, whether the second clause shews so expressly that the wife was not to take the estate in fee given by the residuary clause. Now in the judgment of the above case, Lord *Ellenborough* said, (*q*) "The omission of the word heirs is relied on; but where the words of the residuary clause are so strong and clear for carrying the fee in this reversion, we cannot collect a contrary interest from the mere omission of the word heirs." The same may be said here.

GURNEY, B.—I am of the same opinion. There is an express devise in the

(*p*) 12 East, 141. (*q*) 12 East, 155.

residuary clause of an estate in fee, and nothing inconsistent with it in the subsequent clause.

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Judgment of *nolle prosequi* to be entered for the defendants.

BALLINGER *v.* FERRIS.

Where a constable arrested the plaintiff for an offence against the Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, which he had not seen committed, and of which no complaint had been made to him by the owner of the property, *held*, that although the arrest was illegal, as the constable was acting *bonâ fide* under the act, he was entitled to a month's notice of the action.

TRESPASS and false imprisonment. *Plea*—Not guilty. At the trial at the last assizes for the county of *Monmouth*, before *Williams*, J. it appeared that the plaintiff was driving his waggon through the town of *Chepstow*, and upset, either wilfully or through inadvertence, a donkey-cart drawn up in the street at its right side, and injured considerably both donkey and cart. The bystanders, thinking the plaintiff culpable of the neglect, detained him, and a few minutes afterwards the defendant, who was a police-officer, came up and put him in custody in the lock-up house, where, after being detained for about an hour, he was allowed to go, on leaving one of his horses as a security for his appearance before the magistrate. On the charge being heard before the magistrate, the plaintiff was fined 2*l.*, on the payment of which the horse was restored to him. On these facts it was objected, on the part of the defendant, that as he was acting *bonâ fide* in the exercise of his duty, he was entitled to a month's notice of the action, under the Malicious Trespass Act; and *Beechey* v. *Sides* (*a*) was cited; but the learned judge thought notice was not necessary, as the defendant did not see the trespass committed, and it did not appear that complaint had been made to him by the owner of the cart. The jury found a verdict for the plaintiff, damages one farthing; and the learned judge gave leave to the defendant to move for a nonsuit. A rule having been obtained accordingly, in *Easter* Term,

Greaves now shewed cause against it.—The defendant was not entitled to notice, for s. 28 of the Malicious Trespass Act (*b*) says, "Any person found committing any offence against the act, may be apprehended by any peace-officer or by the owner of the property injured, without a warrant." Now, as the plaintiff was not found committing the act, the defendant was not authorized in arresting. In *Rex* v. *Curran* (*c*), where an arrest was made under a similar act (*d*), it was held, that as the prisoner was not found committing the act, the arrest was illegal; and, the arrest being illegal, the detention is illegal. In *Beechey* v. *Sides* there was an express charge given to the constable by the owner of the property, and there was no doubt about the act being wilful and malicious. In these cases the distinction is not whether the constable is acting *bonâ fide*, but whether he is acting within the scope of his authority. [*Alderson*, B.—Surely, in *Beechey* v. *Sides*, no act was done within the scope of the constable's authority, but he justified in respect of acting *bonâ fide*.] *Cook* v. *Leonard* (*f*) bears out the distinction as to any part of the act being within the scope of the officer's authority. [*Alderson*, B.—In that case it

(*a*) 9 B. & C. 806.
(*b*) 7 & 8 Geo. 4, c. 30.
(*c*) 3 Car. & P. 397.
(*d*) 7 & 8 Geo. 4, c. 29.
(*f*) 6 B. & C. 351.

ought to have been left to the jury to say, whether the party was acting *bonâ fide* or not.] Nor was it left here; it is impossible to distinguish the cases. In *Parton* v. *Williams* (*g*) there is a dictum of *Bayley*, J's. that applies forcibly: "All that Lord *Kenyon* could be understood to have said (*h*) is this, that inasmuch as the defendant had not a warrant, and as he was not acting on his own view, he was not acting in his character of constable, and therefore was not entitled to the protection of the 8th section (*i*). [Lord *Abinger*, C. B.—It all turns on the 7 & 8 Geo. 4, c. 29, whether the constable is entitled to notice or not. He is entitled; when he is acting in the execution of his office. *Alderson*, B.—He must be entitled to it, if he is in the wrong; for if he be in the right it is not necessary.]

Ludlow, Serjt., *contrà*.—It may be admitted that the defendant was not justified in arresting: the only question is, was he acting *bonâ fide?* In *Beechey* v. *Sides*, *Taunton*, *arguendo*, urged the same argument used to-day. "The defendant was not acting in execution of the act; he was a wrong-doer." But, per Lord *Tenterden*, C. J., "If he acted lawfully, he would not require any notice whatever." He was then stopped by the Court.

Lord ABINGER, C. B.—The Court are all of opinion that the officer acted illegally; but the question is, whether he supposed himself to be acting under the authority of the act. Now it would be very invidious and disastrous in its consequences, for a public officer to enter into all the minutiæ of an act of parliament like this. The defendant must have been close by; a statement was made to him, and he takes the plaintiff into custody, and detains him. It is questionable, perhaps, whether the act was not an accident; and it might not have been malicious: the bystanders, however, thought it was malicious; consequently, although the officer may have acted *bonâ fide*, it perhaps was an illegal arrest, and a case for small damages. That being so, it is just the case where the act entitles the defendant to notice, to give him an opportunity of tendering amends. Therefore, though the act was not justifiable, it is pretty apparent that the defendant considered he was acting under the authority of the statute.

BOLLAND, B., concurred.

ALDERSON, B.—It is quite clear that under the 41st section (*k*) of the act, the plaintiff would have no costs, as the judge has not certified he is satisfied with the action brought by the plaintiff.

GURNEY, B., concurred.

Rule discharged.

(*g*) 3 B. & Ald. 330.
(*h*) In *Postlethwaite* v. *Gibson*, 3 Esp. 226.
(*i*) 24 Geo. 2, c. 44.
(*k*) 7 & 8 G. 4, c. 29; that section enacts, that "though a verdict shall be given for the plaintiff, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be, shall certify his approbation of the action, and of the verdict obtained thereon."

BOUNSALL *v.* HARRISON.

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ASSUMPSIT by the indorsee against the acceptor of a bill of exchange, drawn by *Needham* upon the defendant, payable to his order three months after date, at the house of — *Robertson*. *Pleas*—first, that the defendant accepted the bill for the accommodation of one — *Robertson*, without value; and, secondly, that *Robertson* indorsed the bill to the plaintiff after it became due. *Replication*—that *Robertson* indorsed for value before the bill became due; and a traverse of the first plea.

Where the acceptor of an accommodation bill was sued by an indorsee, five years after the bill had become due, and no notice of dishonour had been given to any of the parties to the bill, *held*, that as the plaintiff did not call the party for whose accommodation the bill was given, the jury might fairly presume that the bill when it became due was in the hands of the party for whose accommodation it was given, and indorsed afterwards.

At the trial, before *Gurney*, B., at the sittings in term, it appeared that the bill in question had been drawn on the 17th of *July*, 1830, three months after date, by *Needham*, and accepted by defendant for the accommodation of *Robertson;* that it had been indorsed by *Needham* to *Robertson;* and that no notice of dishonor had been given by the plaintiff to any of the parties on the bill. The defendant had been absent from *England* for upwards of a year after the bill became due; but *Needham* had resided at *Brighton*, where he kept a shop for sixteen months afterwards. It also appeared, that pecuniary transactions had taken place between *Robertson* and the plaintiff.

On these facts, *Gurney*, B., told the jury, that it was pretty clearly an accommodation bill; and that if it was indorsed after it became due, the plaintiff could not recover; that if the bill was in the hands of *Robertson* when it became due, that accounted for its not being put in suit; that if *Robertson* had been called, he could have proved whether plaintiff were entitled to recover or not; and that it was for them to say, whether the bill had been indorsed after it became due or not.

The jury found a verdict for the defendant.

J. Jervis now moved to set aside the verdict, and for a new trial, on the grounds of misdirection and want of evidence.—It was not a question for the jury; no evidence was given as to the time when the indorsement was made; therefore, the defendant's plea falls to the ground. [Lord *Abinger*, C. B.—The question is, whether circumstances were not such as to point out the time. The bill was due in *October*, 1830; the action was brought in 1835. Is not that a fair inference, that the bill was in hands that could not sue when the bill became due?] It is submitted that is not a fair inference. The defendant was absent for many months after the bill became due. The question is, are we bound on the mere staleness of the bill to go into facts, to explain why the bill had not been sued upon before. The learned baron ought not to have put it to the jury, that the plaintiff should have called *Robertson*, the affirmative being on the defendant. [*Gurney*, B.—I thought the presumption was, that *Robertson* had used the bill; and that the bill being payable at his house, and no notice of dishonour given, there was a fair presumption of his having taken it up; and the plaintiff not having sued or made any application to the other parties on the bill, appeared to me to raise an inference that the bill was not in his hands when it fell due.]

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Lord ABINGER, C. B.—I am of opinion the learned baron was perfectly right in his direction. Unless the plaintiff chose to call *Robertson* to prove clearly that it was an accommodation bill, and indorsed before it was due, it is a very fair presumption, five years afterwards, when a stranger sues upon it, that it was indorsed after it was due; and this presumption is very much strengthened by the circumstance of pecuniary transactions having existed between *Robertson* and the plaintiff.

PARKE, B.—I entirely concur. Both sides agreed that the burden of the issue was cast upon the defendant; but the question is, whether *primâ facie* evidence to support it was not given by him. The first point is, that the bill was made in *July*, 1830, and not sued on till 1835. I am not prepared to say that that alone would be sufficient to raise the presumption; but here the bill was drawn by *Needham* for the accommodation of *Robertson*, and indorsed by *Robertson*; it was clearly, therefore, *Robertson*'s duty to take up the bill when due; and if the bill had been then in the plaintiff's hands, it is probable he would have given notice to the defendant, which he did not do; the presumption, therefore, is that it was not.

The second point is, that pecuniary transactions had taken place between *Robertson* and the plaintiff, and that very much corroborates the presumption.

Rule discharged. (*a*)

(*a*) See *Brown* v. *Davies*, 3 T. R. 80, and *Boehn* v. *Sterling*, 7 T. R. 427; *Tinson* v. *Francis*, 1 Camp. 19.

BROOMFIELD *v.* SMITH.

Goods sold on a credit unexpired, is a denial of any right of action by the vendor for the price, and therefore need not be specially pleaded under the new rules.

DEBT for goods sold and delivered. *Plea—Nunquam indebitatus.* At the trial, before *Arabin*, Serjt., at the *Sheriffs' Court*, in *London*, the defendant attempted to shew that the goods were sold on a credit not yet expired; but the learned serjeant, on the authority of *Edmunds* v. *Harris* (*a*), refused to admit the evidence, and there was a verdict for the plaintiff.

Barstow having obtained a rule for a new trial,

Ryland shewed cause; and contended, that it was quite against the principle of the new rules that such evidence should be given under the general issue. The answer set up by the defendant was of a debt *debitum in præsenti solvendum in futuro*, and therefore should have been specially pleaded. *Edmunds* v. *Harris*, besides, is a direct decision on the point.

ALDERSON, B.—The test of special pleading is, that it confesses the right of action in the plaintiff, and sets up subsequent matter to defeat it; but this evidence here denies the right of action altogether. *Edmunds* v. *Harris* has been overruled in this court in two or three cases. The evidence here admits the debt, but attempts to set up an answer in excuse of payment.

(*a*) 2 Ad. & Ell. 414.

Lord ABINGER, C. B.—The evidence clearly shews that the plaintiff's cause of action had not yet accrued. It has been already decided, that when goods are sold on a special contract, which has not been performed, and the plaintiff declares an implied assumpsit, the defendant may set up the special contract under non-assumpsit (*b*).

Rule absolute.

(*b*) *Cousins* v. *Paddon*, 2 C. M. & R. 547., *ante* vol. 1, 305.

WILLIAMS *v.* PIGGOT.

Service of a writ of summons, under such circumstances as shew that the writ came to the possession of the defendant:—*Held*, equivalent to personal service.

A RULE had been obtained for setting aside the appearance entered by the plaintiff for the defendant, under the 12 Geo. 1, c. 29, s. 1, and all subsequent proceedings, on an affidavit by the attorney of the defendant, that he had not been duly served with the writ of summons.

Erle shewed cause on an affidavit by the clerk of plaintiff's attorney; stating, that after several ineffectual attendances at the house of defendant to serve the writ, he served it enclosed in a sealed envelope on a maid-servant of the defendant, at the door of her house; that the servant took it into the house, and he believed the defendant was at home at the time and received the writ; that he waited for an answer, and in about five minutes a man came out of the house, whom he requested to bring back the note, but he answered, "I can't do that;" and he contended, on the authority of *Rhodes* v. *Innes* (*a*), that this was equivalent to personal service.

Mansel, contrà.—The statute (*b*) shews clearly that the service required must be personal; for it provides, that the plaintiff shall serve the defendant *personally*. If there is any difficulty in serving a defendant, the mode pointed out by the Uniformity of Process Act (*c*) should have been pursued. Serving process in a letter is clearly not sufficient. *Ridpath* v. *Williams* (*d*), and *Rhodes* v. *Innes*, may be considered as overruled by *Digby* v. *Thompson* (*e*), and *Thompson* v. *Pheney* (*f*).

Lord ABINGER, C. B.—I think we should have been disposed to have given this case more consideration, had it not been for the decided cases. It is true the words of the statute are "personal service," but what should be deemed personal service the act has not defined. Suppose a man has received a writ of summons by letter, and he answers that letter, would that be personal service? In one sense it would not. So, again, if the clerk threw down the writ in his presence, and he afterwards sees him take it up, that is not personal service in one sense of the words; but it is equivalent to all the statute meant. Here there is a circumstantial affidavit, from which it may be inferred the defendant did receive the writ. Her attorney swears it is not personal service; but she does not deny that she had possession of the writ, nor, with the other affidavit before her eyes, does she venture to say that it is

(*a*) 7 Bing. 329, 1 Dowl. P. C. 215.
(*b*) 12 Geo. 1, c. 29.
(*c*) 2 W. 4, *c.* 9, s. 3.
(*d*) 3 Bing. 443, 11 Moore, 333.
(*e*) 1 Dowl. 363.
(*f*) 1 Dowl. 441.

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not true. It appears to me that all the statute required was, if the party, on making affidavit of personal service, shew such circumstances as shall persuade the Court that the defendant has received the writ, it is sufficient; the rule, therefore, must be discharged with costs.

BOLLAND and GURNEY, Bs., concurred.

Rule discharged with costs.

ELIZABETH ASHBEE, Administratrix of JOHN ASHBEE, *v.* PIDDUCK and another.

Where to debt on bond conditioned for the payment of 1400*l.* the defendants pleaded payment of 800*l. post diem*, *held* ill on demurrer.

Where a bond has been given for the payment of money on a certain day by A., B., and C., jointly, and it does not appear on the face of the bond that B. and C. are only sureties, it is no defence in an action on the bond against B. and C. after A.'s death, to plead that A. was the principal, and that the plaintiff had released A.'s executor before bringing the action.

It is not necessary to set out a breach in debt on a money bond, as the bond creates the debt, and the condition and defeasance must be stated by the defendant.

DEBT. The declaration stated that the defendant, together with one *Hannah Harrison*, since and before the commencement of the suit deceased, to wit, on the 7th of *January*, 1815, by their certain writing obligatory, sealed, &c., acknowledged themselves to be held and firmly bound unto the said *John Ashbee* deceased, in 2800*l.* above demanded, to be paid to the said *John Ashbee;* yet neither did the said *H. Harrison*, deceased, in her lifetime, nor did the said defendants, pay to the said *John Ashbee* during his lifetime, nor have the said defendants since his decease, nor hath either of them at any time, paid to the said plaintiff, as administratrix as aforesaid, though often required, the 2800*l.* above demanded.

The defendant, *Isaac Pidduck*, craved *oyer* of the bond, which was accordingly set out, and also of the condition, which was, that if *H. Harrison* and defendants, their heirs, &c. should pay to the said *John Ashbee* the full sum of 1400*l.* together with interest, &c. on the 7th of *July* then next, the obligation should be void. He then pleaded, as to the sum of 800*l.* parcel of the said sum of 1400*l.* in the said condition mentioned; that after the 7th of *July*, in the said condition mentioned, and after the death of the said *H. Harrison*, and after the decease of the said *John Ashbee*, and before the commencement of the suit, to wit, on, &c., he the said defendant *Isaac Pidduck*, and the other defendant, *Thomas Neame*, paid to the plaintiff, as administratrix as aforesaid, the said sum of 800*l.* in the introductory part of this plea mentioned, and parcel of the said sum of 1400*l.* in the condition mentioned, together with all interest then due on the whole of the said sum of 1400*l.* in the condition mentioned; concluding with a verification. And the said defendant, *Isaac Pidduck*, as to the said 600*l.* residue of the said sum of 1400*l.* in the condition mentioned, pleaded that he and the defendant, *Thomas Neame*, made and joined in the said writing obligatory, at the request of the said *H. Harrison*, as the sureties only of her, the said *H. Harrison*, to the said *John Ashbee*, in the said writing obligatory mentioned; and that after making of the said writing obligatory, and after the said 7th of *July*, 1815, in the said condition of the said writing obligatory mentioned; and before the commencement of this suit, to wit, on, &c., the said *H. Harrison* duly made and published her last will and testament in writing, and thereby nominated and appointed *Robert Harrison* executor thereof; and that afterwards, to wit, &c., the said *H. Harrison* died without having altered or revoked her said will; and that afterwards, and after the death of the said *H. Harrison*, to wit, on, &c., the said *Robert*

Harrison duly proved the said last will of the said *H. Harrison*, and took upon himself the burthen of the execution thereof. And the said defendant, *J. P.*, further says, that afterwards, and after the death of the said *H. Harrison*, and after the death of the said *John Ashbee*, and whilst the plaintiff was such administratrix as aforesaid, and whilst the said *Robert Harrison* was such executor as aforesaid, to wit, on the 21st of *April*, 1831, by a certain indenture, &c. (setting out deed of composition between the said *Robert Harrison* and his creditors, by which he conveyed all his real estates, and also assigned and transferred all his debts and sums of money, goods, chattels, and effects, to certain trustees, of whom the defendants were two, upon trust to pay a dividend to such of the creditors who should agree to take the dividend in full satisfaction of their debts, and should sign and seal the said deed, whereby they agreed to release the said *Robert Harrison* from all further claim.) The plea then alleged that the plaintiff, being one of the creditors of the said *Robert Harrison* in respect of the said 600*l.*, in the introductory part of the plea mentioned, as such administratrix as aforesaid, did sign and seal the said indenture in token of her agreement to partake of such dividend, and that except, as aforesaid, the said *Robert Harrison* was not, at the time of signing and sealing the said indenture, indebted to the plaintiff in any further or other sum of money whatsoever. Verification.

The other defendant suffered judgment by default.

The plaintiff demurred to the first plea, and assigned the following causes, viz.:—That the said first plea is wholly irrelevant, inasmuch as it is not pleaded to any part of the sum demanded in the declaration, but to a different sum, namely, parcel of the said sum of 1400*l.* mentioned in the condition of the said writing obligatory; and also that a payment of a part only of the said sum of 1400*l.* after the day mentioned in the condition, was no satisfaction or discharge of any part of the penal sum mentioned in the said writing obligatory, and demanded in the declaration; also, that the plea doth not traverse, or confess and avoid the cause of action in the declaration mentioned, or any part thereof; also, that payment of part of the sum mentioned in the condition of the bond, after the forfeiture of the bond, cannot be pleaded in bar of this action, which is for the recovery of the penalty of the bond.

The plaintiff also demurred to the second plea, assigning the following causes, viz.:—That the said plea is wholly irrelevant, inasmuch as it doth not appear that the said *Robert Harrison*, either as the executor of the said *Hannah Harrison* or otherwise, was ever in any respect liable to pay to the said plaintiff, either as administratrix as aforesaid or otherwise, any part of the said money, either in the said writing obligatory, or in the said condition thereof mentioned: nor how the said supposed release in the said plea mentioned was or is any discharge to the said defendant, *Isaac Pidduck*, and the said *Thomas Neame*, or either of them, of or from any part of the said sum in the declaration above demanded, nor how the plaintiff was one of the creditors of the said *Robert Harrison* in respect of the said sum of 600*l.* as in the said last plea is alleged; also, that the said *Robert Harrison*, being in law a stranger to the bond, a release to him could not operate as a release to the obligors of the bond, or any of them, nor could any satisfaction of the bond or any part thereof accrue from him; and also, that the said plea doth not traverse, or confess and avoid the cause of the action in the said declaration mentioned, or any part thereof; and also, that the said plea is pleaded to parcel of the sum of

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1400*l.* in the condition of the said writing obligatory mentioned, and not to any part of the sum demanded in the declaration: whereas, inasmuch as the penal sum mentioned in the bond became a debt at law on the forfeiture of the bond, and as the said penal sum is the sum demanded in the declaration, the last plea ought to have been pleaded to parcel of the penal sum; and also, that the alleged release in the last plea mentioned, is therein stated to have been a release of 600*l.*, parcel of the said sum of 1400*l.* in the condition mentioned; but a release of parcel of the last-mentioned sum, after the forfeiture of the bond, was no release of the sum demanded in the declaration, which is the penal sum mentioned in the said writing obligatory, or any part thereof.

Joinder in demurrer.

Addison, in support of the demurrer, was stopped by the Court, who called upon

Erle.—The first plea is good as a plea of *solvit post diem*, in pursuance of the statute (*a*). [Lord *Abinger*, C. B.—How do you make it out a plea of *solvit post diem?*—for though payment *post diem* is pleaded as to 800*l.*, to the remainder there is no plea at all.] The words of the statute are peculiar, and make it a good plea as to part *post diem*. [Lord *Abinger.*—The statute does not allow such a plea. The bond was forfeited by non-payment on the day mentioned in the condition.] Then as to the second plea, *Hannah Harrison* was the principal, and the defendants were only sureties to this bond; and if they are compelled to pay upon this bond, they may recover immediately from *Hannah Harrison's* executor, on an implied assumpsit. The release to *Hannah's* representative was a satisfaction of the debt. [Lord *Abinger*, C. B.—How does it appear that the defendants are sureties?—you could not give it in evidence. I don't see how you can rely on a release given to the executor of a joint obligor, the surviving obligor only being liable. The statute does not give a plea of release; it only allows the plea of payment *post diem.*] Then there is an objection to the declaration, as it does not appear on the face of it, that *Hannah Harrison* may not have paid the plaintiffs. The declaration alleges that neither *Hannah Harrison* nor the defendants paid *John Ashbee* during his lifetime, nor have the defendants since *John Ashbee's* decease paid the plaintiff, as his administratrix. It is consistent, therefore, with this statement, that *Hannah Harrison* may have paid the plaintiff after the death of her husband.

Addison.—No breach is necessary to be shewn in debt on bond. It has been held in assumpsit, that no breach is necessary to be stated, if the plaintiff states that the defendant is indebted to him. So in debt on bond, we shew that the defendants are indebted, and it is not necessary on principle to set out any breach. The bond creates the debt, and it is for the defendant to shew the condition and defeasance in answer.

Erle.—By uniform practice, the plaintiff in debt on bond must shew that the money has not been paid.

(*a*) 4 Ann. c. 16, s. 12.

Lord ABINGER, C. B.—We think it is not necessary that a breach should be stated. The bond creates the debt; and Mr. *Addison* has put it on the right ground, that the answer should come from the defendant.

BOLLAND, B. and GURNEY, B. concurred.

Judgment for the plaintiff.

DAVENPORT *v.* DAVIES.

INDEBITATUS ASSUMPSIT to recover a bet. *Plea—non assumpsit.* The following particulars of demand were delivered:—

Where the particulars of demand stated that the action was brought to recover a bet lost by R., *held*, that the plaintiff was bound by his particular, and could not shew he had rescinded the bet before the event.

"This action is brought to recover the sum of thirteen pounds, viz. eleven deposited by the plaintiff, and two pounds deposited by one —— *Roberts*, in the hands of the defendant, as stake-holder, and won of the said —— *Roberts* by the plaintiff, on or about the 25th day of *November* last."

At the trial, before Lord *Denman*, C. J., at *Liverpool*, at the last Lent assizes, it appeared that the plaintiff had made a bet with *Roberts* of 10*l.* to 1*l.* that he was worth 3000*l.*, and that he would prove it by ten o'clock the next morning. The same parties had previously made a bet of 1*l.* on the same subject, and the money of both wagers was deposited in the hands of the defendant, as stake-holder. The plaintiff having failed to prove that he had won the bet, claimed to recover the 10*l.* deposit, on the ground of having revoked the bet before the event; and evidence was tendered to that effect at the trial. The lord chief justice was inclined to nonsuit, on the ground of the variance between the evidence offered and the particulars; but he reserved the point, and left it to the jury to say, whether there had been any revocation. The jury found for the plaintiff, with 10*l.* damages.

W. H. Watson having obtained a rule accordingly, to set aside the verdict and enter a nonsuit,

Wightman now shewed cause.—There was contradictory evidence in this case; the other side claimed the whole deposit; but their witnesses were not believed, and there was clear evidence of the plaintiff having claimed the money before the event. [Lord *Abinger*.—The question is, whether the particulars of demand are not binding as to the fact of the wager being decided.] The defendant was not deceived in that, as the stake-holder must have known whether the event had happened or not. A man is not bound so strictly by his particulars, as to be thrown over on any little variance, if he points out the particular money. No case goes the length of saying, that if a man claims more than he is entitled to by his particular, or claims money in a different right, that he is thereby precluded from recovering it. *Lambirth and another* v. *Roff*, (*a*) shews that where the defendant has not been misled by the particular, a trifling variance between the particular and proof is immaterial; and *Harrison* v. *Wood* (*b*), is to the same effect.

Lord ABINGER.—We think this particular is calculated to mislead. The

(*a*) 8 Bingh. 411. (*b*) Ib. 371.

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particular of demand makes the count for money had and received, in effect, a special declaration. From the nature of the particular, the defendant might have prepared himself with a host of witnesses, to prove that the plaintiff had lost the wager; and how can it be said, that the plaintiff is entitled to turn round and say, I abandon that claim, and will proceed to prove I rescinded the bet before the event. The rule, therefore, must be absolute.

Rule absolute.

SHEPHERD and another *v.* O'BRYEN.

It is sufficient if the affidavit of debt state the defendant to be *indebted* to the plaintiff in 40*l.* for the hire of a berth on board a vessel of the plaintiff's, let by the plaintiff to the defendant, and at his request.

IN this case *J. Jervis* had obtained a rule to set aside the *capias* and cancel the bail bond, upon a defect in the affidavit to hold to bail, which stated, "N. T. S. of ——, ship-broker and agent for *James Shepherd* and E. L. D., of &c., owners of the ship called &c., maketh oath and saith, that *Edward O'Bryen* is justly and truly *indebted* unto the said J. S. and E. L. D. in the sum of 40*l.* for the hire of a certain berth on board the said ship, let by the said J. S. and E. L. D. to the said *Edward O'Bryen*, and at his request."

Alexander shewed cause, and relied on *Brown* v. *Garnier*, 6 Taunt. 389.

J. Jervis, contrà.—That case does not proceed on the point objected to; for there it was admitted there might have been enjoyment under the contract, but *non constat* here that there was any; and it is quite consistent with this affidavit, that the defendant might have hired the berth and not gone. Lord *Ellenborough* has likened passage money to freight, in not being payable till the arrival of the vessel. [*Parke*, B.—Suppose the contract was, that the defendant should pay the passage money on being taken down to *Edinburgh*, the question is, whether the plaintiff would not be indictable for perjury, in swearing the defendant was indebted to him?] The cases shew the word indebted has not that force. It has been held frequently, that "being indebted" is mere inference. Thus, on bills of exchange, it must be sworn that the sum of money is due and unpaid, or that the period has elapsed (*a*). Suppose a place were taken in the mail, and the party is not there at the time of departure, and the coachman fills up the place, would there be a debt due? [*Parke*, B.—That would be matter of defence, and go in reduction of damages. Does the ordinary form state that the party has been actually on board ship.] The words in *Chitty's* Forms, 25, are, "for the passage of the said C. D., in and on board of a ship or vessel of this deponent." [*Parke*, B.—That applies to a breach, where the money is to be paid at the end of the voyage. The question is, whether this affidavit is not sufficient, where the contract is to pay the money at the time of taking the berth?] If the contract were so, it would be sufficient, no doubt. [*Alderson*, B.—Is it not the criterion of an affidavit, that if it is not true, the deponent may be indicted upon it for perjury?

PARKE, B.—On looking at *Brown* v. *Garnier*, I think it is an authority to consider this affidavit sufficient. There, though the point was not expressly

(*a*) See *Kirk* v. *Almond*, 1 Dowl. P. C. 318; *Edwards* v. *Dick*, 3 B. & Ald. 495.

made, the objection appears rather stronger than in this case; for it was not stated that the carriages were hired by the defendant: now those words are in this affidavit; and, on looking at the form in which it is sworn, I think the plaintiff might be indicted for perjury upon it, if the contract were as Mr. *Jervis* suggests. With respect to those instances where the word *indebted* has been held not sufficient to enable a party to be held to bail, they arise in the cases where a debt arises from inference of law, or where there is a *debitum in præsenti solvendum in futuro*, in which, although the party is in a sense indebted, the affidavit must shew that the day of payment is passed. In other cases, the word indebted must have its full effect.

BOLLAND, B.—I also think the affidavit is sufficient, on the authority of *Brown* v. *Garnier*, but I should have preferred that it had stated the debt to be due on the contract being made.

ALDERSON, B.—I am of the same opinion. It appears to me that full effect must be given to the word indebted, except in the cases pointed out by my brother *Parke*.

GURNEY, B. concurred.

Rule discharged.

LLOYD *v.* JONES.

Where a writ of summons was indorsed as "issued by W. L., *agent* for the plaintiff"—*Held*, bad.

J. JERVIS had obtained a rule for setting aside the service of a copy of the writ of summons in this cause, of which the following was the indorsement:—"This writ is issued by *William Loaden*, of 32, *Gt. James Street, Bedford Row, agent* for the plaintiff in person, who resides at *Barmouth*," on the ground that the writ did not appear to be sued out, either by the plaintiff in person or by his attorney.

Sir *Gregory Lewin* now shewed cause; and contended, that section 12 of the Uniformity of Process Act (*a*) did not require the name and place of abode of an attorney to be stated, where the writ was sued out by the plaintiff in person. Now although Mr. *Loaden* is an attorney of this court, in fact the plaintiff is conducting his cause in person, and the section is complied with by the insertion of plaintiff's residence.

Sed per Curiam.—The rule requires the writ to be sued out either by the plaintiff in person or by his attorney; here it is by neither; for Mr. *Loaden*'s name appeared not as an attorney but as agent. The rule, therefore, must be

Absolute, with costs.

(*a*) 2 W. 4. c. 39.

Exchequer.

STUBBS *v.* LAINSON and SALOMANS.

1. In an action on a false return to a writ of *fi. fa*, the declaration stated, that the defendants *seized and took* in execution divers goods, &c. *and levied* the value, &c. thereout—*Held*, that the traverse that defendants did not seize or take, *and* levy thereout, was too large, and that it ought to have been in the disjunctive.

2. In such an action, where the sheriff returned *nulla bona*, it is sufficient *primâ facie* evidence for the plaintiff to prove that the sheriff seized the goods.

CASE against the sheriffs of *London* for a false return to a writ of *fi. fa.* The declaration stated, that "the defendants *seized and took in* execution divers goods and chattels of the said *George Allen*, of great value, to wit, of the value of the monies so indorsed and directed to be levied as aforesaid, *and then levied* the same thereout." The defendant's plea traversed, "that they *seized or took* in execution any goods and chattels of the said *George Allen*, *and levied* the monies so indorsed and directed to be levied by the said writ, or any part thereof, *modo et formâ*. Special demurrer and joinder. The marginal note to the demurrer stated, "that the plaintiff will contend that the plea is bad, because it traverses an allegation in the conjunctive, which might have been supported by proof in the disjunctive, the effect of the traverse being, to impose on the plaintiff more extensive proof than is by law essential to the support of his case."

Miller, in support of the demurrer, cited *Goram* v. *Sweeting* (*a*) and *Moore* v. *Bonecott* (*b*).

James, contrâ.—The plaintiff is bound to prove more than the seizure; for although the sheriff may have seized, he would be compelled to withdraw his execution if there was a prior extent: he should, therefore, prove that he obtained the money. [Lord *Abinger*, C. B.—Why is he bound to prove more than that the sheriff seized? he is not bound to prove a negative.] In *O'Brien* v. *Saxon* (*c*), it was held, that the facts of the plaintiffs trading, the act of bankruptcy, and the petitioning creditor's debt, constituted only one issue; and in *Wray* v. *Lord Egremont* (*d*), *Patteson*, J. said, that on the 9th section of 21 Jac. 1. c. 19, the words serve and execute have the same meaning; so here, the seizing and levying form one transaction, and are convertible terms.

Lord ABINGER, C. B.—If you can shew us any authority that the plaintiff is bound to prove more than the seizure by the sheriffs, that, of course, will have its weight, but without authority, if you take it on analogy, when the plaintiff states enough to maintain an action, the answer must come from the other side. You had better amend, if you have any case.

Judgment for the plaintiff, with leave for the defendant to amend.

(*a*) 2 Wms. Saund. 204, and authorities in note 207 ib. n. 24.
(*b*) 1 Bing. N. C. 323.
(*c*) 2 B. & C. 908.
(*d*) 4 B. & Ad. 122.

ROSE *v.* EDWARDS.

Exchequer.

INDORSEE against the indorser of a bill of exchange for 25*l.*, drawn by *T. Davies* upon *T. Moore*, and indorsed by *Davies* to the defendant, and by him to the plaintiffs. There were also counts for goods sold and delivered, and on an account stated. *Pleas*—to the first count, 1st, that defendant did not indorse the bill to the plaintiff; 2ndly, that he had not due notice of dishonour. To the other counts—non-assumpsit.

At the trial, before Lord *Abinger*, C. B., at the sittings at *Westminster* after last *Easter* Term, it appeared that the plaintiffs were china manufacturers, residing in *Staffordshire*, and carried on their business in *London* by an agent. The defendant, *John Edwards*, was a carver and gilder in *Shepherd's Market, Oxford Street*. His brother, *William Edwards*, had formerly had a crockery-shop in the same street, but had become insolvent. He had, however, entered into a composition with his creditors, who agreed to accept 2*s.* 6*d.* in the pound from *William*, and 2*s.* 6*d.* in the pound from *John Edwards*, upon which the business was assigned to *John*, the defendant, who continued to carry it on, *William* and his wife occasionally appearing in the shop to attend on customers, as well as the wife of the defendant; and the defendant's name was put over the door. It appeared, also, that the defendant had admitted his responsibility for all goods ordered for the shop, and that orders for goods given by persons attending in the shop had been paid by the defendant. The plaintiffs were creditors of *William Edwards* in the amount of 87*l.*, in respect of which the defendant paid the 2*s.* 6*d.* composition due from him, but *William* had neglected so to do. On application for this composition to *William*, amounting to 11*l.* odd, he offered the bill declared upon, and requested that goods should be supplied to the china shop to make up the balance, the defendant's wife joining in the order. The plaintiffs consented to this, and took the bill of exchange, which was indorsed by the defendant, and supplied goods to the amount of 14*l.* 0*s.* 8*d.* It appeared, however, that the indorsement was not in the defendant's handwriting, and that it had not been made with his authority. No notice of dishonour to the defendant was proved. On these facts the plaintiffs contended, that though they might not be entitled to recover the whole amount of the bill, they were, at all events, entitled to recover the amount for which they had supplied goods.

The defendant contended that he was not liable for the goods on the order given, and that if he were, the plaintiffs had taken the bill as payment, and by not giving due notice of dishonour had made it their own. The lord chief baron thought that if the taking of the bill by the plaintiffs had been relied upon as payment, the fact should have been pleaded; and he told the jury that if they thought *William Edwards* had a general authority to buy goods for the defendant, to find a verdict for the plaintiffs on the second count, with nominal damages; and he gave the plaintiffs leave to move to increase the damages to 14*l.* 0*s.* 8*d.*, and the defendant to move to enter a verdict for

A. the brother of the defendant, acted as his shopman, and had authority to order in goods for the shop. A. was indebted to the plaintiff in 11*l.* and on being pressed for payment offered a bill of exchange, drawn and accepted by C. and D., and which bore the indorsement of the defendant. The bill being for 25*l.* he desired that goods to make up the balance should be sent to the defendant's shop. In an action on the bill and for goods sold against the defendant, it appeared that the defendant's indorsement was not made by him or with his authority.—*Held*, that as it appeared by the evidence that the goods were not furnished on the credit of the bill alone, but on the credit of the defendant also, the plaintiffs were entitled to recover on the count for goods sold.

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himself. The jury having found accordingly, cross rules were obtained on a former day in this term, pursuant to the leave reserved.

Kelly and *V. Richards* for the plaintiffs.—The substance of the contract was to sell goods, and to pay for them by a bill of exchange. [Lord *Abinger*, C. B.—What has occurred to me is, the contract may have been, not to sell goods and to pay money for them, but to sell goods for a specific bill of exchange.] It is submitted, that if the contract were to deliver goods for a bill, and the bill be not paid, a count for goods sold lies: but it is objected, that a debt being due from a third party to plaintiff, that debt was to be paid by a bill of exchange given by the third party, and a parcel of goods were delivered by the plaintiff, to make up the balance of the bill. But if the goods were delivered under the contract, and the brother had given no bill at all, then the plaintiff could recover for goods sold; as where the contract is, to pay by bill at three months, directly the bill is dishonoured, the plaintiff may bring *indebitatus assumpsit*. [Lord *Abinger*, C. B.—Suppose a man sells goods for a bill in existence, and to which the buyer does not put his name, could he recover on a count for goods sold?] We must go by steps: 1st. If no bill had been delivered at all, goods sold would lie; 2nd. But the bill contracted for not having been delivered, it is the same as if none had been delivered at all. True, the plaintiff supplied goods on the credit of the bill, but he did not undertake to deliver goods on a bill bearing a forged indorsement of the defendant, and the defendant is estopped from saying that it is a forgery. [*Parke*, B.—The points to be decided are, 1st. Is there sufficient evidence in this case to support a count for goods sold and delivered; and, 2ndly, Whether the party who ordered the goods had authority as agent.] The jury found that there was authority in *William* to order the goods, and that the defendant was liable. [*Parke*, B.—I understand though the jury have found the fact of agency, as all points were reserved, it is still open to argument.] The evidence given satisfied the lord chief baron and the jury, of authority in the shopman to bind the defendant. [*Parke*, B.—Supposing you to have got over that difficulty, the question arises, whether, where a bill is given in exchange for goods, the inference can arise, that the bill was not given as payment, but as security for payment. Lord *Eldon* says, in *Ex parte Blackburn* (*a*), "I take it to be now clearly established, that if there is an antecedent debt, and a bill is taken, without taking an indorsement, which bill turns out to be bad, the demand for the antecedent debt may be resorted to. It has been held, that if there is no antecedent debt, and A. carries a bill to B. to be discounted, and B. does not take A.'s name upon the bill, if it is dishonoured there is no demand, for there was no relation between the parties except that transaction, and the circumstance of not taking the name upon the bill is evidence of a purchase of the bill. This case seems to come within the second branch of that proposition.] The case here is, the plaintiff delivers goods, and gets for it a bill of exchange from an authorized agent, and therefore it is not a purchase of the bill, but a sale of goods, and payment of it by bill. The bill to be given was to have the defendant's indorsement, and it is impossible to say that the goods were not supplied on the faith of such a bill. The plaintiff has not had such a bill, and therefore may recover for goods sold (*b*). As to

(*a*) 10 Ves. jun. 206.

(*b*) See *Puckford* v. *Maxwell*, 6 T. R. 52.

the notice of dishonour not being given, the defendant, not being a party to the bill, is not entitled to it, or at any rate, being given in payment on a third party, it was only necessary to show that it was presented for payment to that party, and nothing obtained from it.

Platt and *Miller, contrà.*—The two questions are, 1st. Was *William* an authorized agent of the plaintiff: 2ndly, Was the bill given in exchange for the goods, or as payment by bill. Now the bill was given by *William* to cover his own debt, and goods were to be delivered to make up the balance; therefore, so far from being a sale in pursuance of authority, it was a sale to cover his own liabilities. If the transaction took place with *William* only *cadit quæstio*, if with *William* acting as agent for his brother, no evidence was given of his agency: for, taking for granted that the bill was not indorsed by the defendant, was it authorized by him to be delivered after indorsement? The general doctrine as to agency is laid down in *Guerriero* v. *Peile* (*c*), and *Wiltshire* v. *Sims* (*d*); and it is clear it is the duty of an agent not to mix up other matters with a contract to the detriment of his principal. Here *William Edwards* has made a contract on his own business, and had clearly no authority to bind his brother.

Cur. adv. vult.

On a subsequent day in this term, the judgment of the Court was delivered by

Lord ABINGER, C. B.—The question in this case is, whether a verdict was to be entered for the plaintiff for the sum of 14*l.* 0*s.* 8*d.*, or that a verdict should be entered for the defendant or a nonsuit. It appears the plaintiff in the case was a creditor of *William Edwards*. *William Edwards* carried on the business of a china-man; and being involved in difficulties, he assigned his stock in trade to his brother, on the consideration that his brother *John* should pay a dividend of two and sixpence in the pound, *William* also agreeing to pay two and sixpence in the pound himself. The name of *John* was put on the shop, and *William* was in the shop to attend, apparently for his brother, and the wife of *John* occasionally going to sell. It appears by the evidence, that *John* admitted his responsibility for all goods purchased for the shop, and if orders were given in the shop, they were taken to be for the brother. Under these circumstances the plaintiff goes to the shop to demand of *William* his dividend. *William*, in the mean time, had obtained from two of his debtors a bill of exchange drawn by them for the amount of their debts to his own order, for a certain sum, but exceeding the two and sixpence in the pound that he owed to the plaintiff. Upon the plaintiff's application for the two and sixpence in the pound, *William* applied to him to take this bill of exchange as a payment of the two and sixpence in the pound, and to supply the remainder in goods, the plaintiff being a dealer in wholesale crockery-ware. The plaintiff took the bill to consider about it, and afterwards upon the application of *William* and the defendant's wife, who threatened to retain the bill, he sends goods in to the amount of 14*l.* 0*s.* 8*d.* At the time the bill is handed to him, the name of *John* was put on it, but without *John*'s knowledge

(*c*) 3 B. & Al. 616. (*d*) 1 Camp. 258.

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or authority; and therefore *John* was not the indorser of the bill, and so the jury found, and that there was no notice of the dishonour of the bill. The question is, whether *John* is liable to the plaintiff for the 14*l.* 0*s.* 8*d.* for the goods that were delivered on the credit of the bill. If the goods had been delivered on the credit of the bill on account of the bargain with *William*, and not on the credit of *John*, we should have been of opinion that the plaintiff would not be entitled to a verdict; but it manifestly appears that the plaintiff did not intend to take the bill, and did not take it entirely on the credit of their names to the bill, independently of *John*'s name. He took it on the presumption that the bill belonged to *John*, and *John*'s name was upon it, and it must be considered that he was agreeing to sell goods on the credit of *John*; and therefore it stands thus:—*John* being willing to give his credit, the plaintiff agrees to let him have goods to a certain amount, and that he, the plaintiff, will accept the bill of exchange in payment of the half-crown in the pound. That is the way in which the case stands: under these circumstances we cannot say but that there was sufficient evidence to go to the jury, to justify the finding that the goods were sold on *John*'s credit; and if sold for *John*'s credit, the bill must be considered as paid, and the property as sold. We think, therefore, the verdict ought to stand for the plaintiff for 14*l.* 0*s.* 8*d.* The other rule must be discharged.

Rule absolute to increase the damages, on the second count, to 14*l.* 0*s.* 8*d.*
Rule to enter a verdict for the defendant discharged.

OSBORNE *v.* WILLIAMSON.

The application to discharge a prisoner out of custody, on the ground that he had become a bankrupt, and obtained his certificate, must be founded on an affidavit shewing that the certificate was enrolled.

Where an action was commenced ten months after a flat of bankruptcy was issued against the defendant, and the defendant did not plead his bankruptcy, but gave a cognovit for the debt and costs, and after action brought he obtained his certificate, *held*, that he was entitled to his discharge out of custody, as the cognovit did not create a new debt, although it was conditioned for payment at a later date than judgment could have been obtained.

HUMFREY, on a former day in this term, had obtained a rule to discharge the defendant out of custody on a judgment signed on a cognovit, because he had obtained his certificate under the Bankrupt Act.

Petersdorff now shewed cause; and contended, that the affidavit in support of the rule did not state that the certificate was enrolled, which must appear to the Court before a bankrupt is entitled to his discharge. *Jacobs* v. *Phillips* (*a*).

Humfrey.—That is not necessary to be shewn in the affidavit; if the enrolment is produced to the Court now, that is sufficient. [Lord *Abinger*, C. B.—I do not see how the production of the roll of another court can satisfy this

(*a*) 1 C. M. & R. 195.

court, without its being verified by affidavit. [The objection was then waived, and cause was shewn on the merits.]

Petersdorff.—In this case the action was brought ten months after the fiat issued: although, it is true, the defendant did not obtain his certificate till after the action brought. The defendant did not plead his bankruptcy, but he agreed to give a cognovit conditioned for payment of the debt and costs in three months, which was later than the period at which judgment might have been obtained. A new security, therefore, was given.

Lord ABINGER, C. B.—How do you make out a cognovit to be a new security? The statute entitles a bankrupt to his discharge, if the cause of action before the bankruptcy. Suppose he had allowed judgment to go by default, it would have been the same thing. A cognovit does not create a new debt. The rule must be absolute, but you must get an affidavit of the fact of the affidavit being enrolled. A loose expression of the lord chief baron is not to be understood to mean that the affidavit may be dispensed with, and that production of the certificate is sufficient. The fact should have appeared before us at the time of granting the rule *nisi*.

Rule absolute.

ANONYMOUS.

The affidavit to change the venue in a suit may be made by the attorney.

A QUESTION having arisen in the master's office, whether an affidavit to change the venue made by the defendant's attorney was sufficient, *Wightman* applied to the Court, and stated that there was no authority requiring it to be made by the defendant himself; and that on application to the officers of the Court of K. B. it appeared, that the affidavit to change the venue in that court was constantly made by attornies, and the Court, upon inquiry, held the affidavit sufficient.

WHITFIELD *v.* HODGES.

Bail are not discharged by time being given to a principal, within the limits in which regularly final judgment could be obtained against him, although the plaintiff might have signed final judgment by the order of a judge at an earlier period.

A WRIT of *capias* having been sued out by the plaintiff against one *Surridge*, on which he was taken; the defendant and another became his bail. *Surridge* having given a bill of exchange, at two months, for the debt and costs, which was dishonoured when it became due, the plaintiff's attorney gave notice to *Surridge* that he should go on with the action, for which notice of trial had been given for the ensuing spring assizes for *Essex*. At a meeting of the parties by consent at Mr. Baron *Gurney*'s chambers, *February* 27th, the learned baron made an order, "that on payment of the debt and all costs, including briefs, by *Surridge*, to the plaintiff, on or before *Tuesday* next, (the 1st of *March*), all further proceedings should be stayed; and in default thereof, the plaintiff to be allowed to sign final judgment and to issue execution." On the *Monday* following, the 29th, the plaintiff's attorney received the taxed costs fron *Surridge*, but gave him a month's additional time to pay the debt; but afterwards he signed judgment on the order.

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Surridge not paying the debt at the end of the month, a *ca. sa.* issued against him, and, on its being returned ***non est inventus***, the plaintiff commenced the present action against the defendant, in which he had signed judgment for want of a plea.

Fish, in this term, having obtained a rule to set aside this judgment (*a*), and for an *exoneretur* to be entered on the bail-piece,

Erle and *White* now shewed cause.—In this case it has been moved to enter an *exoneretur* on the bail-piece, because time has been given to the principal; but the authorities shew, that where by any agreement the debt is to be paid within the time in which the plaintiff would have been entitled to judgment and execution, the bail are not discharged (*b*). In this case we could not have got judgment till *April* 20th (*c*). Therefore the time given to the principal was within the limits; and it is just like the case of a cognovit being given, by which the debt was to be paid by instalments, before the day on which the plaintiff could have obtained judgment; where Lord *Tenterden* laid down the clear, intelligible rule, "that bail are not discharged, unless by the terms of the cognovit the defendant is to have a longer time for the payment of the debt and costs than he would have, if the plaintiff had proceeded regularly in the action." *Stephenson* v. *Roche* (*d*).

Platt and *Fish*, *contrà*.—Here the bail have been prejudiced; for if the plaintiff had signed final judgment against the principal, as he might have done, the bail could have rendered him, and discharged themselves. The plaintiff, having made the agreement, was bound to go on with and obtain fruition of his judgment. [*Parke*, B.—Suppose time to plead had expired, and the plaintiff said, "I won't sign judgment, if you will plead to-morrow," would that be a discharge of the bail?] The present is a real substantial agreement, not the case of a mere slip. [*Alderson*, B.—Can't a party waive a part of an agreement, if the bail are thereby put into no worse situation?] There is no evidence whatever of waiver; the plaintiff might have signed judgment, but he did not choose.

Lord ABINGER, C. B.—If the order of the judge had been a hostile proceeding between the parties, there might have been a good deal in the argument for the defendant. But it is an arrangement in the nature of a cognovit, and I have always understood that when a cognovit has been given which enables the plaintiff to sign judgment at an earlier period than he would be otherwise entitled to, the bail are not thereby discharged. In this case, judgment was not signed before the order was made; and if before the time at which judgment could have been regularly obtained, the plaintiff renounces the advantages which he expected from the agreement, it comes quite within the principle of a cognovit.

(*a*) The rule was made absolute to set aside the judgment, as it appeared that the defendant had obtained an order of *Alderson*, B. for four days to plead, two of which were unexpired when judgment was signed.

(*b*) 2 Tidd Pr. 295, 9th ed.

(*c*) The commission day at *Chelmsford* was *March* 7th, and *April* 15th the first day of *Easter* Term.

(*d*) 9 B. & C. 707.

PARKE, B.—I agree entirely with the principle laid down by Lord *Tenterden* in the case cited; and I should be sorry to interpose any obstacles to this sort of arrangements being made at chambers, as they are oftentimes very beneficial.

In this case, on the 27th of *February* an order was made by my brother *Gurney*, by the consent of the parties: on the 29th they came to a fresh arrangement, by which the time was extended for a month, the costs having been paid down. If this agreement was not binding on the plaintiff, the case is out of court, as the bail would then of course not be discharged. But supposing this argument to be incorrect, and that the parties were bound by it, I hold that they were at liberty to renounce the agreement and stand upon their original rights, or to make a further extension of time, provided judgment were not signed. For if at the beginning of a week an arrangement had been made for the payment of debt and costs, and a plaintiff find that he would be more likely to obtain payment by giving a few days' time, it would be very hard if this could not be done without discharging the bail. The fresh agreement here was entered into on the *Monday*, and it was before judgment was signed; the bail, therefore, are not discharged. It might have been different if the agreement had been made after judgment was signed.

BOLLAND and ALDERSON, Bs., concurred.

Rule absolute for setting aside the judgment; but
Discharged as to the entering an *exoneretur* on the bail-piece, without costs.

WATKINS *v.* O'GORMAN MAHON.

A defendant who had been arrested for 200*l.* on an attorney's bill, applied after plea pleaded and notice of trial given, to tax the plaintiff's bill, upon which an order was made by consent, that the plaintiff be at liberty to sign judgment immediately, and that the plaintiff's bill of costs be referred to the master to be taxed, the plaintiff undertaking to pay 106*l.*, leaving a balance of 148*l.* odd; 60*l.*, part of the sum disallowed, had been actually expended by the plaintiff according to the defendant's directions:—*Held*, that the plaintiff had reasonable and probable cause for making the arrest, and that the defendant was estopped by the terms of the order from complaining of the arrest.

MAULE, in *Easter* Term, had obtained a rule, calling upon the plaintiff to shew cause why so much of the order of Mr. Justice *Patteson* as required the defendant to pay the costs in this cause should not be discharged; and why the plaintiff should not pay the defendant's costs for having arrested without reasonable or probable cause. On the affidavit it appeared that it was an action upon an attorney's bill for expenses incurred in defending *O'Gorman Mahon*, for a misdemeanour, and that

The total bill amounted to	£487	19	2
Of which there was received on account	232	10	0
Balance	255	9	2

The plaintiff arrested the defendant for 200*l.*, who obtained the following order from *Patteson*, J.:—

"Upon hearing the attornies or agents on both sides, and by consent, I do order that the plaintiff be at liberty to sign final judgment immediately, and that the plaintiff's bill of costs, on account whereof this action is brought, be

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referred to the master to be taxed; that the plaintiff give credit on such taxation for all sums of money by him received for and on account of the defendant; and that upon payment of what (if any thing) may on such taxation appear due, together with the costs of action, to be also taxed and paid, all further proceedings herein be stayed. And I do further order, that in default of payment, the plaintiff be at liberty to issue execution in four days after the master's allowance for the amount specified in such allowance."

Upon taxation, 106*l.* 16*s.* 10*d.* was taxed off, leaving a final balance of 148*l.* 12*s.* 4*d.*

J. Jervis now shewed cause.—The first part of the rule must be discharged, as the order of the judge was made by consent of the parties. [*Maule* intimated that he abandoned that part of the rule.] As to the second part of the rule, it was granted on the authority of *Robinson* v. *Elsam* (*a*); but that case does not apply, as it has been held, there must be a recovery by verdict, *Rowe* v. *Rhodes* (*b*), or by the finding of an arbitrator, to bring it within the statute (*c*). Neither can it be contended that the statute does not apply, the plaintiff being an attorney, over whom the Court will exercise their jurisdiction; but it is a question whether the ground taken by *Abbott*, C. J. to that effect, in *Robinson* v. *Elsam* (*d*), can be supported. It used to be thought good law, till *Dagley* v. *Kentish* (*e*), where Lord *Tenterden* said much doubt was entertained on the point, and refused to send the bill in that case for taxation; and *Wilson* v. *Gutteridge* (*f*) was doubted by *Littledale*, J. On the facts the plaintiff's affidavits shew reasonable and probable cause for the arrest.

[*Maule* objected to the affidavits being read, as they contained statements made by the defendant to the plaintiff confidentially, as his attorney in another suit. *Sed per Curiam.*—Let only such parts be read which go to the reasonable and probable cause.]

Jervis.—The affidavits state that the ground of deduction by the master was this:—in the indictment against the defendant he had had briefs prepared in *Ireland;* but the night before the trial came on, he wished to have two additional counsel, and the plaintiff was obliged to employ law stationers to sit up all night to prepare the briefs, and the master would not allow the costs on these briefs, though the law stationers' bill alone amounted to 38*l.*

Maule, contrà.—There can be no doubt as to the jurisdiction of the Court over an attorney, independently of the statute, and it was so decided in *Watson* v. *Postan* (*g*), which is subsequent to *Dagley* v. *Kentish*. [Lord *Abinger*, C. B.—All that may be true, but what do you say to the facts?] The judgment of the master, as of a competent tribunal, ought to be conclusive. [*Alderson*, B.—In *Robinson* v. *Elsam* (*h*), the master found there was no reasonable or probable cause.] He did so, but the master heard the

(*a*) 5 B. & Al. 661.
(*b*) 2 C. & M. 379.
(*c*) 43 Geo. 3, c. 46, s. 3.
(*d*) 5 B. & Al. 661.
(*e*) 2 B. & Ad. 411.
(*f*) 3 B. & C. 157.
(*g*) 2 Tyr. 406.
(*h*) 5 B. & Al. 661.

plaintiff's statement at taxation, and, with full materials for judging, he decided the plaintiff was not to have them.

Lord ABINGER, C. B.—It appears to me that there are no grounds for depriving the plaintiff of his costs, and that we may decide this case entirely on its merits. The sum disallowed by the master has been actually expended, and we cannot say that when a party expends money out of pocket for his client, he has not a right to expect that that money shall be repaid: and although the master does not think that that sum forms an item which ought to be allowed, still I cannot say that the plaintiff had not reasonable and probable cause for making the arrest for it.

PARKE, B.—I think in this case there was clearly reasonable and probable cause for making the arrest; and even if I did not, I should be very unwilling to disturb arrangements entered into between contending parties. If the defendant meant to contend that he had been arrested for too much, he ought to have taken his stand before the master, and should have stated to the judge before the order was made that he intended to bring that point before the Court.

ALDERSON, B. concurred.

Rule discharged with costs.

DOE d. EDWARD BEARD *v.* ROE.

GASELEE had obtained a rule, under 1 Geo. 4, c. 87, calling on the tenant to shew cause why in case a verdict passed for the plaintiff, he should not give the plaintiff a judgment of the preceding term; and why he should not enter into recognizances in himself and two sureties, to pay the costs of the action, &c.

The affidavit to obtain a rule for bail, &c. under the 1 Geo. 4, c. 87, must swear positively to the execution of the lease or agreement by the tenant.

The notice to quit, under the same statute, must appear to have been given by the authority of the landlord.

Mansel now objected to the affidavit, on which the rule was obtained, on the ground that it did not appear that the execution of the lease had been properly attested. The affidavit of the attesting witness only stated, "that the name of *W. Powell*, subscribed to the said agreement as party thereto, is of the proper handwriting of the said *W. Powell*, as *this deponent verily believes.*" On reference to the act, it will be seen that that is not sufficient.

Per Curiam.—The handwriting ought to be positively sworn to.

Gaselee having obtained leave to file a fresh affidavit on payment of costs,

Mansel, on a further day, objected that the notice to quit did not appear to have been given by the landlord, *E. Beard*, as it was signed *C. Beard*, without shewing any privity.

Gaselee contended that no notice to quit was necessary, and that the ob-

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jection could not be taken now, as the parties had been before the Court before.

PARKE, B.—The notice to quit is essential. You have not complied with the act; therefore the rule must be discharged.

Rule discharged.

PULLEN *v.* SEAVEN.

The Court of Exchequer will review the decision of the judge at *Nisi Prius*, as to amending the record under 9 Geo. 4, c. 15.

ASSUMPSIT on a bill of exchange. The declaration stated that one J. B. on, &c. at, &c. made his bill of exchange in writing, and directed the same to one R. S., and thereby required the said R. S. to pay to his order 50*l.*, which period had then elapsed, &c. *Plea*—that the defendant did not accept the bill in the declaration mentioned.

At the trial, at *Guildhall*, before *Gurney*, B., the bill, when produced in evidence, appeared to be drawn at three months after date, but the averment was omitted in the declaration. The learned baron refused to amend the record, under 9 Geo. 4, c. 15, and nonsuited the plaintiff.

Humfrey having obtained a rule to set aside the nonsuit, on the ground of its being a mere clerical omission, and referred to *Parry* v. *Fairhurst* (*a*),

Steer now shewed cause; and contended, on the authority of *Parks* v. *Edge* (*b*), and *Doe d. Poole* v. *Errington* (*c*), that the Court had no authority to revise the opinion of the judge at *Nisi Prius*, acting on the 9 Geo. 4, c. 15.

PARKE, B.—Those were cases under the Law Amendment Act; but we have no doubt that we have authority to review the decision of a single judge on a present statute (*d*); and this appears to us to be a case in which the amendment should have been allowed. But as the defendant may have been misled in his pleading (*e*), the amendment must be made on payment of costs, with liberty to the defendant to plead *de novo*.

The other judges (*f*) concurred.

Rule absolute.

(*a*) 2 C. M. & R. 190.
(*b*) 1 C. & M. 429.
(*c*) 1 Ad. & Ell. 750.
(*d*) 3 & 4 W. 4, c. 42.
(*e*) An affidavit of the defendant was read, stating that he had a defence to the action, but had been advised by his special pleader to rely on the above plea.
(*f*) BOLLAND, B. ALDERSON, B. and GURNEY, B.

TURNER *v.* SWAINSON, Clerk.

Exchequer.

An action respecting a right of way was referred by order of *Nisi Prius* to an arbitrator, who was to direct what should be done between the parties. He ordered the plaintiff to put up a stile on a piece of land belonging to C. who was not a party to the submission:—*Held*, void.

TRESPASS, *q. c. f. Plea*—a justification under a public right of way.

At the trial a verdict was taken for the plaintiff; and the cause and all matter in difference between the parties were referred to arbitration by an order of *Nisi Prius*, with power to the arbitrator to direct what should be done between the parties. He directed a verdict to be entered for the defendant, and he awarded also that the plaintiff should put up a stile and foot-bridge, on the way in question, at a spot mentioned in the award.

R. V. Richards, on a former day in this term, moved for a rule *nisi* to set aside the award on two grounds:—first, that the arbitrator was not authorized, by the terms of the reference, to set aside the verdict that had been found for the plaintiff; and secondly, that the arbitrator had ordered the plaintiff to put up a stile on ground not belonging to him, and therefore he would be guilty of a trespass in complying with the order. [*Parke*, B.—You may have a rule on that point, though the only effect would be to set aside the award *pro tanto;* it is clear, on the first point, that an arbitrator may set aside a verdict for the plaintiff, and enter it for the defendant, without any special words to that effect.]

Talfourd, Serjt., on a subsequent day, shewed cause on an affidavit, stating that the dispute related to the opening of a road, and that the spot where the arbitrator order the stile to be put up belonged to a third party, but that there was no doubt he would permit the stile to be put up, on application being made to him; and he contended that it did not appear that the plaintiff had made any attempt to comply with the order.

R. V. Richards, contrà.—The arbitrator had no power to order the plaintiff to do any thing that would subject him to an action of trespass, and he was not bound to make any attempt to comply with the order. [*Alderson*, B.—It is quite clear they could get no attachment against you, if the owner of the land refused to consent.] If an application were made for an attachment, perhaps that objection would not succeed, unless we had moved to set aside the award.

PARKE, B.—I am rather disposed to think the award is void. If the terms of the order had been conditional to put up the stile, provided the owner of the land consented, it might have been supported; but the terms are absolute, and an order of an arbitrator having reference to a person not a party to the submission, and implying his consent, must be void.

Rule absolute.

Exchequer.

WARD *v.* PEEL.

Where an issue had been delivered in the common form, as for a trial at *Nisi Prius*, and subsequently a judge's order had been obtained to try before the sheriff, service of the judge's order, and of notice of trial, is irregular, as the plaintiff ought to have taken out a summons to amend the issue.

PETERSDORFF, on a former day in this term, had obtained a rule, calling upon the plaintiff to shew cause why the issue and why the service of the order of a judge to try this cause before the sheriff, and the notice of trial which had been delivered, should not be set aside for irregularity. It appeared that the issue in question had been delivered for a trial at *Nisi Prius* on *May* 19th: on *May* 30th a copy of a judge's order to try before the sheriff, and notice of trial, was served on the defendant.

Busby now shewed cause.—By the 3 & 4 W. 4, c. 42, s. 17, which empowers a judge to direct that the issue joined shall be tried before the sheriff, there is nothing to point out that the order shall be made previous to the issue being delivered. The issue, therefore, on the 19th *May* was perfectly regular. At all events, the rule asks too much, as the service of the judge's order was good.

Lord ABINGER, C. B.—This rule must be made absolute. The intention of the statute is, that a judge's order should be obtained before the issue is made up, as the statute points out the description of the writ that shall be addressed to the sheriff. The plaintiff in this case ought to have obtained an order to amend the issue. The service of the judge's order is also bad, for how can it be valid, where no issue to try before the sheriff was made up?

Rule absolute.

BROOK *v.* LLOYD.

Where the plaintiff pleads issuably, but does not add the *similiter* for the defendant, the latter is not entitled to judgment as in case of nonsuit, unless he has added the *similiter* himself.

ARCHBOLD had obtained a rule for judgment as in case of a nonsuit.

Sewell shewed cause.—There were three special pleas, to which the plaintiff replied issuably; but no *similiter* was ever added; therefore, the cause has never been at issue; and he cited *Gilmore* v. *Melton* (*a*).

Archbold.—The question turns on the rule of Hil. 2 W. 4, s. 59, which enables the plaintiff, when his pleading concludes to the country, to add the *similiter*, without ruling the defendant to rejoin. The effect of that rule is to dispense with the *similiter* altogether.

Lord ABINGER, C. B.—The meaning of the rule is, that the plaintiff may add the rejoinder for the defendant; but if he does not, the defendant must. You move for judgment as in case of nonsuit, because the cause was at issue two terms ago: it now turns out that issue has not been joined at all. The rule, therefore, must be discharged.

Rule discharged.

(*a*) 3 Dowl. P. C. 633.

SIEBERT and another, Assignees of MITCHELL, a Bankrupt, v. SPOONER.

Exchequer.

The assignment of all a trader's estate and effects to one creditor is an act of bankruptcy, without any fraud on the part of the trader.

ASSUMPSIT for the use and occupation of certain lands, and the eatage of the grass thereon, due to the plaintiffs, as the assignees of *Mitchell*, a bankrupt. There were also counts for money had and received, and on an account stated. *Pleas*—first, non-assumpsit; secondly, that *Mitchell* had not been nor was a bankrupt.

At the trial, at the last *York* spring assizes, before Lord *Denman*, C. J., the plaintiffs, in order to prove the bankruptcy, put in a deed of assignment, dated the 26th of *August*, 1834, made between *Mitchell* and the defendant, whereby *Mitchell* (after reciting that he was indebted to the defendant in the sum of 490*l.*) assigned to the defendant all his household goods and effects, all his tenant-right in his farm and his farming stock, stock in trade, utensils, and all other his personal estate whatsoever. Upon this transaction it appeared that the defendant gave *Mitchell* bills to the amount of the goods. The plaintiffs also put in indentures of lease and release, dated the 5th and 6th of *September*, 1834, whereby *Mitchell* conveyed all his freehold property to the defendant. Upon these facts it was contended, that the deed of *August* 26th, being a conveyance of all the personal property of *Mitchell*, was an act of bankruptcy. The defendant contended, that such a conveyance must be made fraudulently, in order to delay or defraud the other creditors, in order to make it an act of bankruptcy. The lord chief justice left it to the jury to say, whether *Mitchell* had executed the deed fraudulently, with intent to defeat his other creditors; and his lordship told them, unless *Mitchell* had done it fraudulently, it did not appear to him that the conveyance was an act of bankruptcy. The jury found a verdict for the defendant; and, in *Easter* Term last, *Blackburn* obtained a rule for a new trial, on the ground of misdirection.

Milner now shewed cause.—The question is, whether this was a fraudulent conveyance within the meaning of the 6 Geo. 4, c. 16, s. 3, and in contemplation of bankruptcy. *Baxter* v. *Pritchard* (*a*) shews that an assignment by a trader of his whole stock for a good consideration is not an act of bankruptcy. [*Parke*, B.—There the trader received a full equivalent for his goods, with which he might have purchased others. On the present point, I have always considered *Newton* v. *Chantler* (*b*) decisive.] That case proceeded on a ruling of Lord *Mansfield*, which it is submitted is wrong. These questions were much considered in *Baxter* v. *Pritchard*. The assignment here appears to have been only for a temporary purpose. [*Parke*, B.—That is immaterial; suppose there had been a secret trust that all the property should be reassigned, still the effect of the conveyance would be to assign all the means of trading. *Alderson*, B.—How do you get over that clause in the act which declares, that a conveyance of all the trader's property shall not be an act of bankruptcy, unless the commission is sued out within six months.] It is contended, that the deed did not convey all his property; being a partner,

(*a*) 3 Nev. & Man. 383. S. C. 1 A. & E. 77. (*b*) 7 East, 138.

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he could not assign the partnership property. It was a question for the jury to say, whether the conveyance was made by *Mitchell* to defraud his creditors. *Gibbins* v. *Phillips* (*c*).

Blackburn and *Hoggins, contrà*, were not called upon by the Court.

Lord ABINGER, C. B.—I think there must be a new trial. If there had been clear proof that the assignment had been merely made for a temporary purpose, there might have been something to raise a question whether it would operate as an act of bankruptcy; but on general principles, it must be taken for granted, that if a trader assign all his property to one creditor, without proper consideration, that that is an act of bankruptcy, as it entirely incapacitates the trader from discharging his other obligations. The clause pointing out that a conveyance of all a trader's property shall not be an act of bankruptcy on which to found a commission, unless it be sued out within six months, shews that this is so. The jury ought to have been told that the conveyance of all a man's effects to one creditor is by itself a fraud on the other creditors.

PARKE, B.—I take it to be perfectly well settled, that in transactions of this kind there is no occasion to be actual fraud on the part of the trader; but the conveyance of all a trader's estate and effects is of itself necessarily an act of bankruptcy, without any fraud or fraudulent preference exhibited by him. *Wilson* v. *Day* (*d*), *Eckhardt* v. *Wilson* (*e*), *Newton* v. *Chantler* (*f*). In this case I think the assignment was of all the trader's estate and effects; the question of fraud, therefore, was improperly left to the jury.

BOLLAND, B.—Independently of cases, I should say that an assignment of all a trader's estate and effects must operate as an act of bankruptcy; but in *Hassell* v. *Simpson* (*g*) all fraud was negatived, and Lord *Mansfield* said, "It has been settled over and over, that if a trader makes a conveyance of all his property, that is instantly an act of bankruptcy." He went on to say, "In this case, *Jackson* (who had made the assignment) could not sell an ounce of property after the assignment. The whole belonged to another man. It was a fraud in *Jackson* to deal with any body as a trader." Now, on the face of this deed, the transaction is exactly of the same nature that Lord *Mansfield* alluded to, for it appears to be a conveyance of all the trader's property.

ALDERSON, B.—I always understood that the conveyance of all a trader's estate and effects was of itself an act of bankruptcy, and that a conveyance of part, if made with an intent to defraud his creditors, is also an act of bankruptcy. That is the distinction to be drawn. The class of cases alluded to, where a full consideration is given for the goods, do not apply; for the trader there has as much capacity for trading as he had before. It would be absurd to contend that a small trader selling the last packet out of his shop for a full equivalent, would thereby commit an act of bankruptcy. The 4th section of

(*c*) 7 B. & C. 529.
(*d*) 2 Burr. 827.
(*e*) 8 T. R. 140.
(*f*) 7 East, 138.
(*g*) 1 Dougl. 92.

the 6 Geo. 4, is a clear exposition of the act of bankruptcy mentioned in the previous clause; because it says that the conveyance by a trader of all his estate and effects shall not be an act of bankruptcy, unless the commission issue within six calendar months. That section, therefore, shews that such a conveyance, if questioned, is fraudulent; and the question of fraud, therefore, ought not to have been left to the jury.

Rule absolute.

DOE d. PEMBERTON and others *v.* EDWARDS.

Where A. by indenture of lease conveyed certain premises to M. E., to "hold the same to the said M. E., and her heirs from, &c. for and during the natural lives of the said M. E.'s son J., her daughter M., and A.'s granddaughter, and the life of the survivor of them," and A. had no granddaughter till some years after the making of the indenture, *held*, that the estate enured during the lives of T. & M. only.

THE facts in this case were stated by the consent of the parties under the Law Amendment Act (*a*), in the following special case.

John Campbell, at the time of making the indenture of demise hereinafter mentioned, was seised in his demesne as of fee of the premises mentioned in the declaration in this ejectment, then in the occupation of *Mary Edwards*, the lessee hereinafter mentioned, or her under-tenants, as tenant to him. And being so seised the said *John Campbell*, by an indenture bearing date the 29th of *September*, 1779, and duly enrolled in the Court of Common Pleas in the following *Hilary* Term, and made between him, the said *John Campbell*, of the one part, and *Mary Edwards*, of the other part, in consideration of certain yearly rents and covenants in the said indenture mentioned, demised the said premises, therein described as in the occupation of her and her under-tenants, to the said *Mary Edwards*, to have and to hold the same to the said *Mary Edwards* and her heirs, from the feast of *St. Michael the Archangel*, then last past, for and during the natural lives of the said *Mary Edwards*'s son *John Edwards*, her daughter *Martha Edwards*, and *Alexander Edwards*'s granddaughter, and the life of the survivor of them.

The said *Alexander Edwards* was a son of the said *Mary Edwards*. He had no granddaughter living at the time of making the said indenture, nor had he ever any granddaughter before the said indenture was made, but he had a daughter *Elizabeth*, his eldest child, and two other children then living.

He did not have any granddaughter until the year 1797, when *Martha*, a daughter of his said daughter *Elizabeth*, was born; and since that time, and during the lifetime of the said *John Edwards* and *Martha Edwards*, two of the said *cestui que vies* named in the said lease, the said *Alexander Edwards* had twelve other granddaughters, all of whom, including the said *Martha*, the daughter of *Elizabeth*, are still living.

In the year 1807, the lessors of the plaintiff purchased the premises in question from the said *John Campbell*, and the same were by him duly conveyed to them, subject to the lease aforesaid.

Martha Edwards, one of the *cestui que vies* in the lease mentioned, died in *March*, 1830; *John Edwards*, the other of the *cestui que vies* in the said lease mentioned, died on the 10th of *March*, 1835; and the said *Elizabeth*, the daughter of *Alexander*, died some years previously to the said year 1835.

The question for the opinion of the Court was, whether the estate created

(*a*) 3 & 4 W. 4, c. 42, s. 25.

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by the said indenture of demise was or not determined upon the death of the said *John Edwards*.

The following points were stated in the margin:—

The lessors of the plaintiff contend that the lease expired on the death of the said *John Edwards*.

The defendant contends that the lease was to endure for the life of *Alexander*'s first daughter, who should come into *esse* after the making of the lease, or any granddaughter living at the death of two other *cestui que vies* named, and that, consequently, it did not determine on the death of *John Edwards*.

V. Williams, for the lessor of the plaintiff, was stopped by the Court, who called upon

W. Rogers.—This was either an estate in fee simple uncontrolled, or an estate with a limitation impressed upon it by words of ordinary construction. There is no reason why the estate in fee should not be determined by the birth of the granddaughter, as well as by any other event *in esse*. The Court is to say, where that estate other than fee simple was to determine. *Alexander Edwards*, at the time of the conveyance having no granddaughter, there is no principle violated by saying that the estate should continue during the life of the granddaughter born afterwards. [Lord *Abinger*, C. B.—Suppose he had never had a granddaughter?] Then it would be an estate in fee simple.

Lord ABINGER, C. B.—It appears to me that the only doubt in this case is whether any thing passed at all. Suppose a man granted an estate for the lives of three persons, all of whom were dead at the time of the grant, undoubtedly nothing would pass. I cannot see that we have any right to graft any thing on this conveyance. I presume it a mistake of the grantor, and that he thought there was such a person in existence; but how are we to help the party to one granddaughter or another? If there were any case to bind us to a different construction, it might be different; but as it is, it appears to us that the estate enured during the lives of the two *cestui que vies* in existence at the time, and ended at the death of the survivor of them.

BOLLAND, B. and GURNEY, B. concurred.

Judgment for the plaintiff.

LIGHTFOOT *v.* KEANE.

A testator devised his estates to trustees, upon trust, to receive the rents and profits, and pay and apply two-thirds of them to the plaintiff, and one-third to his widow during her life, and after her decease he devised the estates to the plaintiff in fee. The trustees deposited the deeds with the defendant, an attorney, for purposes connected with the trust, who claimed to detain the deeds as a lien for his charges incurred in respect thereof:—*Held*, that he was not entitled to detain them from the plaintiff on the death of the widow, as the debt incurred was the personal debt of the trustees.

THIS was an action of debt, with a second count in detinue for title-deeds.

Plea—to the second count, that one *John Lightfoot* was seised in his demesne as of fee of certain messuages, tenements, and premises, to which those title-deeds belonged; and being so seised, in the year 1824, by his will devised those estates unto *Joseph Spicer* and *James Keane*, upon certain trusts

in the said will particularly mentioned, who took upon themselves the execution of the will, and became and were seised of the estates upon the trusts in the said will contained, and by virtue thereof entitled to the possession of the said title-deeds, and afterwards delivered them to, and deposited and lodged them with the defendant, being the attorney and solicitor of the said *Joseph Spicer* and *James Keane*, for the affairs and business connected with and arising out of the trusts of the will, to be by the defendant used and referred to in the suits, affairs, and business, in which the defendant was so employed as such attorney and solicitor, and for all other purposes connected with or arising out of the trusts of the will. That the said *J. Spicer* and *James Keane*, whilst the deeds continued in the possession of the defendant, became indebted to the defendant in the sum of 120*l.* for work and labour in different certain causes and suits, and for certain fees of right due and payable in respect thereof, which sum of money still remained unpaid, wherefore the defendant, having a lien upon the said deeds, detained them for his lien, as it was lawful for him to do.

Replication—That the trusts in the will were that the trustees should receive the rents and profits, and pay and apply two-thirds of them towards the education and maintenance of the plaintiff, until he attained the age of twenty-one years, and after he attained twenty-one, to pay them to him, and the remaining third part to his widow for her life; and that after her decease, the testator devised the estates to the plaintiff in fee. Certain executory devises were then stated; after which the replication went on to aver, that the widow died on the 30th of *April*, 1830, and that the plaintiff attained the age of twenty-one on the 24th of *February*, 1834, and requested the defendant to deliver up the deeds. *Demurrer*, assigning for cause that the plaintiff had not traversed or denied, or confessed and avoided, the matters alleged in the plea; nor had the plaintiff denied that the defendant had such lien on the title-deeds as the defendant had alleged; neither had he, in his replication, shewn that the lien of the defendant upon the deeds had been paid, satisfied, or otherwise discharged.

Joinder in demurrer.

Channel, in support of the demurrer.—It may be admitted as a general principle, that the party entitled to the estate is entitled to the title-deeds; but in this case the plaintiff took the estate, subject to all its incumbrances. This is not, indeed, the case of a remainder-man taking under a limitation, but under a will when a trust is created. The trustees were required to do certain acts for the protection of the estate, and for the benefit of the *cestui que trust*, and he in justice ought to be bound by their acts.

W. H. Watson, contrà, was not called upon by the Court.

Lord ABINGER, C. B.—It is quite clear that the defendant can have no lien on those deeds; for the trustees were not authorized to mortgage the estate, and therefore could not deposit the deeds. The debt incurred by them was clearly a personal debt, for which they are liable.

Judgment for the plaintiff.

Exchequer.

HEATH *v.* FREELAND.

Materials cannot be recovered under a count for work and labour only.

DEBT. The declaration contained counts for "work and labour," and on an account stated. The defendant pleaded a tender of 7*l.*, and *nunquam indebitatus* as to the residue. The tender was admitted by the replication; and issue was joined as to the residue of the plea. At the trial, before the under-sheriff of *Sussex*, the plaintiff gave evidence of carpenter's work done, and materials for it provided, by the plaintiff: it was objected by the defendant, that materials could not be recovered on a count for work and labour only. The under-sheriff giving leave to the defendant to move to enter a nonsuit, left the case to the jury, desiring them to apportion the sums due for work, and for materials. The jury found 8*l.* 4*s.* to be due for materials, and 4*l.* 4*s.* 10*d.* for work and labour.

Gale obtained a rule to enter a nonsuit, pursuant to the leave reserved, citing *Cotterell* v. *Apsey* (*a*).

G. T. White shewed cause.—The plaintiff was at liberty to apply the tender to any other demand, and proceed for the work and labour. [*Parke*, B.—It is for the plaintiff to shew that the defendant was indebted on the counts in the declaration, in a sum exceeding 7*l.*, and there is no evidence at all of an account stated; and the jury have found the amount of the work and labour to be only 4*l.* 4*s.* 10*d.*] Then the plaintiff is entitled to recover for the materials under this count. In *Cotterell* v. *Apsey* there was a special building contract; this is an ordinary contract for work and labour, to which the supply of materials may be considered ancillary.

Gale, contrà, was stopped by the Court.

Lord ABINGER, C. B.—The Court think the case is not distinguishable from *Cotterell* v. *Apsey*, which they are not disposed to overrule.

Rule absolute to enter a nonsuit.

(*a*) 6 Taunt. 322.

WHEATLEY and another *v.* WILLIAMS.

Semble, that an instrument in the following terms is a promissory note:—"I have received the imperfect books, which, together with the cash overpaid on the settlement of your account, amounts to 80*l.* 7*s.* which sum I will pay in two years."

Semble, a promissory note stamped as an agreement, with a stamp of equal value to the proper note-stamp, is admissible in evidence, unless it is shewn that it was stamped after it was written.

Held, that such instrument was evidence of an account stated of debts, which would become due in two years, and that the Statute of Limitations did not begin to run until the expiration of the two years.

Knowledge which an attorney obtains in the course of his retainer as such, of the state of a deed, *e. g.* whether when shewn to him by his client it was stamped or not, is privileged.

ASSUMPSIT by the plaintiffs, as surviving partners of *William Stewart*. The first count of the declaration stated, that on the 18th of *December*, 1827, an account was stated between the plaintiffs and *William Stewart*, and the defendant; and that the defendant was found to be indebted to them in

the sum of 80*l.* 7*s.*; and that thereupon afterwards, to wit, on, &c., in consideration of the premises, and that they would give time to the defendant for payment for two years, the defendant promised to pay in two years. Breach in non-payment. There were also counts for money paid by, and on an account stated with, the plaintiffs and their deceased partner. *Pleas*—to the first count, that defendant did not promise the plaintiffs and *Stewart* in manner and form, &c. Secondly, Non-assumpsit to the other counts. Thirdly, the Statute of Limitations to the whole declaration; concluding to the country (*a*). Fourthly, a set-off for goods sold, money lent on account stated, &c.

At the trial, before *Parke*, B., at the *Middlesex* sittings, after *Trinity* Term, 1835, it appeared that the action was brought by the plaintiffs, as surviving partners of the firm of *Stewart, Wheatley*, and *Adlard*, auctioneers, to recover a sum of 55*l.* 7*s.* due to them as a balance of accounts with the plaintiffs and *Stewart*, who died in 1829. The following letter was offered in evidence on the part of the plaintiffs:—

"Gentlemen,—I have received the imperfect books, which, together with the cash overpaid on the settlement of your account, amounts to 80*l.* 7*s.*, which sum I will pay you within two years from this date.

"I am, gentlemen,

"Your obedient servant,

"*Dec.* 18th, 1827. "*Theo. Williams.*"

"To Messrs. *Stewart, Wheatley*, and *Adlard, Piccadilly.*"

The letter was stamped with an agreement stamp. 25*l.* had been since paid. It was objected, on the part of the defendant, that this letter was a promissory note, and inadmissible because not stamped as such; and that if received, it gave no evidence of an agreement on the part of the plaintiffs to forbear; and therefore the debt was barred by the Statute of Limitations, more than six years having elapsed from the date of the letter.

The learned judge overruled the objections; and, under his direction, the plaintiffs had a verdict on the first and third issues, as far as they related to the account stated, and a general verdict on the second and fourth issues: damages 55*l.* 7*s.*

In the subsequent *Michaelmas* Term, *Platt* obtained a rule to shew cause why there should not be a new trial, on the ground that the note received in evidence was not properly stamped; or for judgment *non obstante veredicto:* and a cross rule was obtained by the plaintiffs to amend the issue, upon the plea of the Statute of Limitations. The two rules came on together.

Hoggins for the plaintiffs.—The letter was properly stamped as an agreement; but if not, if it be a note, the objection is removed by the enactment of the stat. 55 G. 3, c. 184, s. 10, that "all instruments for or upon which any stamp or stamps shall have been used of an improper denomination, or rate of duty, but of equal or greater value in the whole with or than the stamp or

(*a*) At the trial, an application was made to the learned judge to amend this issue, by making the plea conclude with a verification, and adding a proper replication and rejoinder; the application was refused.

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stamps, which ought regularly to have been used thereon, shall nevertheless be deemed valid and effectual in the law; except in cases where the stamp or stamps used on such instruments shall have been specifically appropriated to any other instrument, by having its name on the face thereof." And it lies upon the other party to shew that this is a stamp specifically appropriated to a promissory note. [*Parke*, B.—The commissioners are prohibited from stamping any bill or promissory note; but by this means you might always make a bill receivable in evidence, by getting it stamped as an agreement.] There was no evidence to shew that the letter was not written upon a paper stamped as an agreement. As to the other point, the plaintiff is entitled to retain his verdict; a sufficient issue was joined on the plea of the Statute of Limitations. In *Duppa* v. *Mayo* (*b*), it was decided that that plea ought to conclude to the country; but if it be conceded that such a conclusion would have been bad on demurrer, that the plaintiff has a right to introduce new matter by his replication, he may waive that right and join in the issue tendered to him. *Veale* v. *Warner* (*c*). [*Parke*, B.—In this case, there is no affirmative; all that is in the declaration is, that there was at one time a debt.]

Platt appeared for the defendant; but the Court expressed a clear opinion that the verdict on the issue on the Statute of Limitations could not be supported, and that, supposing the agreement to have been improperly received, still there must be a new trial awarded, and in the nature of a repleader as to that issue. The Court did not decide whether an instrument, which was in law a promissory note, would be admissible if written upon a paper stamped with an agreement-stamp of higher amount than the note-stamp; but they said that an agreement-stamp imposed after the making of the instrument, would be certainly insufficient, as a violation of the prohibition by the stat. to the commissioners to restamp any bill or note.

Rule absolute for a new trial; with leave to both sides to amend the pleadings.

The pleadings were amended, and the cause was tried at the sittings in last *Easter* Term, before *Gurney*, B. On the part of the defendant, it was attempted to be shewn that the letter had been stamped after it was written; and to prove that fact, a Mr. *Burnett*, who was *Stewart's* attorney at the time it was written, was called. He stated that he saw the letter about the period of its date, it being shewn to him by *Stewart* in the course of business, for which he made a charge as an attorney. It was then proposed to ask him in what state, as to a stamp, the letter was when he saw it: it was objected, that his knowledge was obtained in the course of his professional duty, and that it was therefore privileged, and he could not be permitted to give evidence of it. The learned judge was of this opinion, and also that the letter was evidence of an account stated. The plaintiff again had a verdict, damages 55*l.* 7*s.*

In the same term, *Platt* obtained a rule to shew cause why there should

(*b*) 1 Saund. 284. (*c*) Id. 326.

not be a new trial, on the grounds that the evidence of the attorney was improperly rejected, and that the instrument was not evidence of a debt due within six years.

In this term, *Erle* and *Hoggins* shewed cause.—The letter, even assuming it to be a promissory note, was clearly evidence of an account stated at the time it was written, and of an account stated of sums not due until the expiration of two years, and upon which, therefore, no action could be brought until after that time; it therefore brings the debt within six years before the commencement of the suit. The evidence of Mr. *Burnett* was properly rejected. The case is precisely the same as if a letter had been written to him by his client, to advise whether the defendant's letter afforded sufficient ground of an action, and in that case it could not be contended that knowledge so acquired was not privileged.

Platt, contrà.—The state of the letter was a fact with which Mr. *Burnett* might have been acquainted, and was acquainted of his own knowledge; and it is laid down in *Buller's Nisi Prius*, 284, that such knowledge is not privileged. The case is not the same as if Mr. *Burnett's* knowledge had been derived from information given him by his client. Instances of such evidence are given in *Buller*:—"As suppose him witness of a deed produced in the cause, he shall be examined as to the true time of execution. So if the question were about a razure in a deed or will, whether he had ever seen such deed or will in other plight, for that is a fact of his own knowledge; but he ought not to be permitted to discover any confessions his client may have made to him on such heads." The last case is cited in *Buller* as Lord *Say* and *Sele's* case, and is said to have been decided by Sir *O. Bridgman*, with the advice of the judges. But supposing the letter to have been properly received in evidence, as it was not declared on as a promissory note, it can be evidence only of the state of accounts between the parties at the time it was written, of an account stated at that time, and that is more than six years before the commencement of the suit.

Lord ABINGER, C. B.—It appears to me that this rule must be discharged. Upon the question of the rejection of evidence, I think the passage in *Buller's Nisi Prius* must be confined to cases in which an attorney acquires knowledge independently of any communication with his client. In this case the document was exhibited to the client for a professional purpose, and all the knowledge so acquired by the attorney of any thing upon the face of the instrument was privileged.

BOLLAND, B. concurred.

ALDERSON, B.—It appears to me that the privilege extends to every kind of knowledge which an attorney obtains, which he would not have obtained but for his situation.

GURNEY, B. concurred.

Rule discharged.

Exchequer.

LYON *v.* TOMKIES, PITT, and STANDAGE.

In an action on the stat. 2 W. & M. sess. 1, c. 5, s. 2, for not paying the overplus above the amount of rent distrained for to the sheriff, &c., the defendant pleaded that he paid the overplus to the plaintiff, (the owner of the goods), who accepted it in satisfaction of the cause of action:—*Held*, that proof of a payment of a sum of money to the plaintiff in the name of an overplus was not conclusive evidence in support of the plea, but that it was a question for the jury, whether the plaintiff received it in full satisfaction, and if not, that it was open to the question for them, whether the charges, above which and the rent it was to be overplus, were regular.

CASE. The first count was for an excessive distress; the second, for distraining and selling more goods than were sufficient to satisfy the rent, and the charges; the third, for selling for insufficient prices; and the fourth count was founded on the stat. 2 W. & M. sess. 1, c. 5, s. 2, for not leaving the overplus amount above the arrears of rent, and the charges of the distress, in the hands of the sheriff of *Middlesex*, or his under-sheriff, or of the constable of the parish, hundred, or place wherein the distress was taken, for the use of the plaintiff so being the owner of the goods as aforesaid. The defendant *Standage* pleaded separately. *Tomkies* and *Pitt* pleaded, *first*, not guilty; *secondly*, to the first and second counts of the declaration, leave and license; and thirdly, to the fourth count, that after the satisfaction of the arrears of rent and charges, to wit, on, &c. the defendants paid to the plaintiffs the overplus, and every part thereof, in full satisfaction and discharge of the cause of action in that count mentioned, and all damages sustained by the plaintiff in respect thereof, which she, the plaintiff, accepted and received in full satisfaction thereof. The replication denied the payment and acceptance of the overplus in satisfaction. At the trial, before Lord *Abinger*, C. B., at the sittings in *London* after last *Michaelmas* Term, it appeared that the acts complained of were not done jointly by the three defendants, and upon the plaintiff's election, *Standage* and *Tomkies* were acquitted. It was in evidence that *Pitt* was a broker, who had, by the direction of the plaintiff's landlord, made a distress upon her goods for an arrear of rent. After the sale the plaintiff's son received an account of the proceeds, and the sum of 6*s*. 3*d*. paid as the balance after satisfying the distress and the charges; he made no complaint of the account. There was evidence of the son being the plaintiff's agent; and the learned judge directed the jury that if they thought that the son was the agent to the plaintiff, they ought to find a verdict for the defendant, expressing his opinion that the stat. did not apply to a case in which the overplus was paid into the hands of the tenant. The jury found a verdict for the defendant.

In *Hilary* Term, *Humfrey* obtained a rule to shew cause why there should not be a new trial, on the ground that the direction of the learned judge withdrew from the jury the questions, whether the stat. had not been complied with, and a right of action had vested, or whether the plaintiff accepted the sum so paid in satisfaction of the cause of action.

In *Easter* Term, Lord *Abinger*, C. B., after reading his notes, said—The question depends upon the construction to be put on the stat. 2 W. & M. sess. 1, c. 5, s. 2; that stat., however, is followed by the stat. 11 G. 2, c. 19, the 19th section of which enacts, that an irregularity shall not make a distress unlawful, and a trespass *ab initio;* but the party aggrieved by any unlawful act shall recover full satisfaction in an action on the case for any special damage he may have sustained, and no more. Then what special damage can be said to have been done to the plaintiff, by paying that into her hands which the stat. directs to be paid into the hands of the sheriff or constable for her

use. I considered that was a compliance with the spirit and substance of the statute. In *Walter* v. *Rumbull* (*a*) it was held, that a notice of a distress given to the owner of the goods was sufficient, although it was not left at the chief mansion-house (*b*). That seems to me an analagous case. If the objection was that the charges were too great, that should have been declared on.

Platt and *Barstow* shewed cause.—The form of the count does not raise any question on the amount of the overplus, but merely whether it was paid to the plaintiff instead of the party pointed out by name by the statute. [*Parke*, B.—How could the plaintiff declare differently, if she meant to question the reasonableness of the charges?] The plaintiff might have declared that the defendant wrongfully paid an unreasonably large sum for charges, and thereby diminished the proper amount of the overplus above the rent and charges. The object of the statute is to secure to the owner the overplus; the officers therein named are the statutory agents of the owner, and therefore, a payment to the owner is equivalent to a payment to the officers, who are agents of the owner.

Humfrey and *Ball* in support of the rule.—The plea states the payment of the plaintiff to have been in accord and satisfaction; that is not conclusively proved by shewing a payment of a sum of money to her, or her agent; but it is for the jury to say, whether it was given and accepted in satisfaction, and that question was withdrawn from them by the ruling of the learned judge. As in *Willoughby* v. *Backhouse* (*c*), the utmost that the plaintiff can be said to have done, was to acquiesce in a payment of a sum of money to her, which would not be in itself a discharge of any right of action; and therefore she clearly retains the right she before had of questioning the amount of charges which were deducted before that sum was paid over. In *Hills* v. *Street* (*d*) it was held, that a promise to a broker who had distrained, to pay his charges in consideration of his forbearance to sell, did not make a payment to him voluntary, and that therefore irregular charges might be recovered back. [*Parke*, B.—If the case goes down again for a new trial, the simple question for the jury will be, whether the plaintiff accepted the 6*s*. 3*d*. as the overplus.]

Cur. adv. vult. (*e*)

Lord ABINGER, in this term, delivered the judgment of the Court.—The opinion of the Court is, that there ought to be a new trial, a *nolle prosequi* being entered as to the defendants, *Tomkies* and *Standage*. The opinion of the majority of the Court—I will not say it is not mine, though I have some doubt—is, that the evidence ought to have been submitted to the jury on the fourth count. The question for them will be, whether the plaintiff received

(*a*) 1 Ld. Raym. 53.
(*b*) But in *Walter* v. *Rumball*, the Court decided on the ground that "the act expressly provided that notice might be given to the owners of the goods." *Vide* Report in Lord *Raymond*.
(*c*) 2 B. & C. 823.
(*d*) 5 Bing. 37.
(*e*) The case stood over on a suggestion by the Court, that the parties should agree to a *stet processus*; they ultimately refused.

Exchequer.

LYON v. TOMKIES.

the sum paid her in satisfaction; if not, whether it was the real overplus above the rent and proper charges (*f*).

Rule absolute accordingly.

(*f*) One of the learned judges observed, that it would be of course open to the plaintiff to go upon either count of the declaration. The rule is, that when a new trial is granted on the ground of misdirection, the whole case must go down again, because upon a bill of exceptions, a judgment of a court of error in favour of the objection would be a *venire de novo* of the whole case; and a new trial on the same ground is a matter of right following the same rule, and the Court cannot impose terms; but an application for a new trial on the ground of the verdict being against evidence, is addressed to the discretion of the Court, who, in granting it, may impose any terms, limiting the trial to an issue on one count, or plea, or even to a single fact of any issue.

STOBART *v.* DRYDEN.

Declarations made by a deceased attesting witness respecting the attested instrument, are not admissible in evidence, though admissions of fraud or forgery on his own part, and though his handwri t i has been proved as proof of the instrument.

COVENANT on a mortgage deed for the payment of a sum of 800*l.* with interest. *Pleas*—first, *non est factum;* secondly, that the deed was executed for the payment of 700*l.*, and that after the execution it had been altered to 800*l.* by one *M'Cree*, one of the attesting witnesses to it, without the consent or knowledge of the defendant.

At the trial, before Lord *Abinger*, C. B., at the last summer assizes for the county of *Durham*, it appeared that there were two attesting witnesses to the deed, one of whom, *M'Cree*, the person mentioned in the plea, was dead; the surviving attesting witness was called, and his evidence was that he had no recollection of having attested such a deed, and did not believe the signature to the attestation to be his writing, nor the signature to the deed to be that of the defendant. The handwriting of *M'Cree*, the deceased attesting witness, was then proved; and other evidence of the defendant's handwriting was given, and of other circumstances in the case. On the part of the defendant, certain letters and statements of *M'Cree* were offered in evidence, which were written and made since the execution of the deed, and which, though not direct admissions of forgery, tended to shew fraud in the executing or altering of it. The learned judge rejected this evidence, and the case, upon conflicting evidence, went to the jury, who found a verdict for the plaintiff. In *Michaelmas* Term, *Cresswell* obtained a rule for a new trial, on the ground that this evidence ought to have been admitted, citing *Wright* v. *Littler* (*a*), *Aveson* v. *Lord Kinnaird* (*b*), 2 *Starkie*, Evid. 263.

Alexander and *W. H. Watson* shewed cause.—Assuming, for the purpose of argument, that the statements of *M'Cree* amounted to an admission that he forged the deed, they still are inadmissible in evidence. It is hearsay evidence, the rule rejecting which is correctly laid down in Mr. *Phillips*'s and Mr. *Starkie*'s treatises:—"Hearsay is not admitted in our courts of justices, as proof of the fact which is stated by a third person. This general rule (subject to certain exceptions to be hereafter mentioned) has been recognized and approved from the earliest times, as a fundamental principle of the law of evidence, and is always to be strictly observed. Some of our earliest writers

(*a*) 3 Burr. 1244. (*b*) 6 East, 188.

lay it down as a proposition, acknowledged in our courts and not to be questioned, that matters of fact shall be tried by proof of witnesses upon oath, before the judges. This implies that the person on whose statement any fact is to be proved, must be sworn in the regular form, and speak to the fact from his own personal knowledge in open court at the time of trial (*c*)." Nor does this case fall within any of the exceptions to the general rule; they have been defined to be (*d*) 1, dying declarations; 2, hearsay in questions of pedigree; 3, hearsay on questions of public right; 4, old leases, &c.; 5, declarations against interest; 6, rectors' and vicars' books; 7, tradesmen's books. Dying declarations are not admissible, unless the inquiry be upon the cause of the death; nor is this evidence a dying declaration. This evidence, it cannot be argued, falls within either of the other exceptions, nor are there decided cases which, carefully examined, warrant the admission of it. *Wright* v. *Littler* (*e*) is relied on; there evidence similar to this was received, but it was not objected to at the trial; and it appears from the report of Sir *W. Blackstone*, that Lord *Mansfield* expressly avoided laying down any rule on the subject. In the subsequent cases of *Aveson* v. *Lord Kinnaird* (*f*), and *Doe* v. *Ridgway* (*g*), it appears to have been considered by Lord *Ellenborough* in the former, and *Bayley*, J. in the latter case, that such evidence ought to be received on the ground that if the attesting witness had been living he must have been called, and would then have been competent to prove on cross-examination his declaration as to the forgery of the bond, or if he denied it, then it might be proved in contradiction. In both these cases, the observations of the learned judge were *dicta* quite unnecessary for the decision of the case. The observation of *Bayley*, J. is cited by Mr. *Starkie*, who appends upon it a note (*h*), that "upon the same principle, evidence has been admitted to impeach the character of attesting witnesses who are dead, and whose handwriting is proved in order to substantiate the instrument." But this position does not appear to be supported by authority: the utmost length to which the cases have gone is to admit evidence of the general good character of attesting witnesses, where fraud is attributed to them in the concoction of the instrument. *Doe dem. Walker* v. *Stephenson* (*i*), *Bishop of Durham* v. *Beaumont* (*k*), *Provis* v. *Reed* (*l*). In the cases in which hearsay evidence is admitted, circumstances are shewn to let it in, which free it from suspicion, such as the antiquity of a lease, an admission against interest, an entry in the course of trade; but as to this evidence there is no compensation for the absence of an oath, and the want of an opportunity to submit it to cross-examination. There is no ground of policy which requires an extension of the exceptions to the rule which rejects hearsay evidence.

Cresswell, Sir *G. Lewin*, and *Addison*, *contrà*.—The evidence is admissible, on the ground that *M'Cree*'s handwriting, having been proved as attesting the deed, the defendant is entitled to give any evidence which he might have done if *M'Cree* had been alive, and had been called as a witness. This position is supported by the cases of *Wright* v. *Littler* (*m*), the case cited by

(*c*) 1 Phill. 7th edit. 229, and in 1 Stark. 43.
(*d*) Id.
(*e*) 3 Burr. 1244, S. C. 1 W. Bl. 346.
(*f*) 6 East, 188.
(*g*) 4 B. & Ald. 55.
(*h*) 2 Stark. 264.
(*i*) 3 Esp. 284, and 4 Esp. 50.
(*k*) 1 Camp. 208.
(*l*) 5 Bing. 435.
(*m*) 3 Burr. 1255.

Exchequer.

STOBART v. DRYDEN.

Lord *Ellenborough* in *Aveson* v. *Lord Kinnaird* (*n*), and the judgment of *Bayley*, J. in *Doe* v. *Ridgway* (*o*). In *Wright* v. *Littler*, the defendant claiming under a will proved the handwriting of a deceased attesting witness: the lessor of the plaintiff in answer relied on a prior will which had been produced by the attesting witness on his deathbed, and gave evidence of a declaration then made by him that the later will was a forgery. Upon this evidence the plaintiff had a verdict, which the Court refused to set aside. Lord *Ellenborough* thus cites a decision of Mr. Justice *Heath*:—"One who was an attesting witness to the supposed execution of a bond died, and after his death an action was brought on the bond, and his handwriting was proved; but I, then of counsel for the defendant, was permitted by Mr. Justice *Heath* to give in evidence that the attesting witness had, in his dying moments, begged pardon of Heaven for having been concerned in forging the bond; and I was permitted to do so on the authority of the case of *Wright* v. *Littler*, which I cited, where similar evidence of a dying confession by the subscribing witness to a deed was admitted by Lord C. J. *Willes*, and afterwards approved by the Court." It is true that both these were cases of dying declarations, but it was not on that ground that they were received. Dying declarations are admissible as such only in cases of homicide, and in which they relate to the cause of the death. The ground of the reception is also expressly stated, both by Lord *Ellenborough* and Mr. Justice *Bayley*. In *Wright* v. *Littler*, Lord *Ellenborough* says, "Mr. Justice *Heath* admitted the evidence, on the ground that if he, the subscribing witness could have been produced at the trial to prove his handwriting to the bond, inasmuch as I might have cross-examined him as to the fact, so I might also prove his declaration of the fact, in contradiction to the presumption of a due execution of the bond from the proof of his handwriting as a subscribing witness." In *Doe* v. *Ridgway*, Mr. Justice *Bayley* says, "The case of the subscribing witness seems to be founded on this: he must have been called on as a witness, if he had been alive, and it would then have been competent to prove, by cross-examination, his declarations as to the forgery of the bond. Now the party ought not, by the death of the witness, to be deprived of obtaining the advantage of such evidence." In the *Bishop of Durham* v. *Beaumont* (*p*), Lord *Ellenborough* considered an inquiry into the character of a deceased attesting witness to be admissible on the same ground. The evidence is admissible when the other party proves the handwriting of the attesting witness; such evidence does not give the security of the oath of the attesting witness; and the evidence of the declaration of the attesting witness, though not made on oath, stands on the same ground, and ought to be admitted to counteract it.

Cur. adv. vult.

PARKE, B., delivered the judgment of the Court.—This was an action on a covenant in a mortgage deed, to which there was a plea of *non est factum*, tried before Lord *Abinger*, at the last summer assizes for the county of *Durham*.

A man named *M'Cree*, who on the face of the instrument appeared to be the subscribing witness, being dead, the execution of the deed was proved in

(*n*) 6 East, 193.
(*o*) 4 B. & Ald. 55.
(*p*) 1 Camp. 210.

the usual way by evidence of his handwriting, and the identity of the defendant was shewn by proof of his. Mr. *Cresswell*, for the defendant, offered in evidence declarations of *M'Cree*, of facts tending to prove that the deed was a forgery. Lord *Abinger* rejected them, and on a motion in the following term, a rule *nisi* for a new trial was granted, which has since been argued, and the Court (*q*) have taken time to consider the question, which, like all others relating to the rules of evidence, is important. We who heard the argument are all of opinion that the evidence was properly rejected.

The general rule is, that hearsay evidence is not admissible as proof of a fact which has been stated by a third person. This rule has been long established as a fundamental principle of the law of evidence, but certain exceptions have also been recognized, some from very early times, upon the ground of necessity or convenience. The simple question for us to decide is, whether such a declaration as this be one of the allowed exceptions to the general rule.

As the plaintiff, upon its appearing that the supposed subscribing witness was dead, was at liberty to give secondary evidence of the execution of the deed, and for that purpose proved the handwriting of that witness in the attestation, (which raises a presumption of the due execution, otherwise the name could not have been placed there), there can be no doubt but that the defendant might also on his part give evidence to rebut that presumption, by the proof of any material fact tending to shew that the deed was not so executed; such, for instance, as the absence of the alleged attesting witness from the place where the deed was stated to have been signed at the time. But the question is, whether he is to be permitted to rebut this presumption, not by evidence of facts proved in the ordinary way, but proved by declarations of the subscribing witness? Is evidence of what the subscribing witness has said admissible?

It was contended, on the argument, that it was; and that it formed an exception to the general rule, and on two grounds: one of them, which I shall mention first, in order to dispose of it, was, that as the plaintiff used the declaration of the subscribing witness, evidenced by his signature, to prove the execution, the defendant might use any declaration of the same witness to disprove it. The answer to this argument is, that the evidence of the handwriting in the attestation is not used as a declaration by the witness, but to shew the fact that he put his name in that place and manner in which, in the ordinary course of business, he would have done if he had actually seen the deed executed. A statement of the attesting witness by parol, or written on any other document than that offered to be proved, would be inadmissible. The proof of actual attestation of the witness is therefore not the proof of a declaration, but of a fact.

The other ground, and the principal one on which reliance was placed, was, that it was in the nature of a substitute for the loss of the benefit of the cross-examination of the subscribing witness, if he had been alive and personally examined, by which either the fact confessed would have been proved, or, if not, the witness would have been liable to have been contradicted by proof of his admission: and it was contended that every declaration was admissible which might have been given in evidence to impeach the credit

(*q*) Lord ABINGER, C. B., PARKE, B., BOLLAND, B., and GURNEY, B.

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of the witness himself on his personal examination. Let us inquire what the authorities are in support of this exception. If we should find them numerous and of long standing, we should be bound to give effect to them, though we might doubt the policy of introducing such a departure from the established rule; if we find them few and of comparatively recent origin, and not supported by the deliberate judgment of any Court, we ought not to sanction the introduction of such an exception, especially if its convenience and practical utility be of a doubtful nature.

The first case referred to, is that of *Wright* v. *Littler*, in which it appeared that a witness for the plaintiff, on his cross-examination by the defendant's counsel, stated that the subscribing witness to an instrument, the validity of which as a will formed a part of the defendant's case, acknowledged in his last illness, on producing as a true document a prior will which he had in his custody, that the instrument in question was forged by himself. No objection was taken to the evidence at the trial. On a motion for a new trial, the whole case was fully discussed, and the application was refused on several grounds, amongst others, the admissibility of this evidence was considered; and Lord *Mansfield*, according to the report in *Burrow*, in answer to the objection that this evidence was improperly received, says, "It came out upon their own examination, they made no objection to it at the trial, and it certainly was a circumstance proper for the jury to consider." And, after alluding to the other facts, he says, "that the account given in the last moments of the subscribing witness was proper, even though it had been upon an examination of the plaintiff; and as the account was a confession of a great enormity, and as he could be under no temptation to say it, but to do justice and ease his conscience, he was of opinion that it was proper to be left to the jury; but, independently of that declaration, he thought fraud and forgery were apparent."

From this report, it is clear that Lord *Mansfield* by no means lays it down distinctly as an established rule of evidence, that such a declaration, even when made *in extremis*, is admissible. If it had been, in his opinion, a rule of law that such statements were evidence, it is not likely that he would have assigned so many other reasons for refusing a new trial; and if we look at the report of the same case in Sir *William Blackstone*'s Reports, that impression is confirmed; for his lordship is stated to have declared distinctly, that no general rule could be drawn from it, and that, unless manifest injustice had been done in the whole case, there was no ground for a new trial. On the authority of this case, Mr. Justice *Heath*, at *Nisi Prius*, admitted evidence that the attesting witness, in his dying moments, begged pardon of Heaven for having been concerned in forging the bond or will; and Lord *Ellenborough*, who states that decision, and apparently with approbation, twice, in 6 East, 195, and 1 Camp. 211, says that it was admitted on the ground, that as the subscribing witness might have been cross-examined as to the fact, his declaration of the fact might have been proved in contradiction to the presumption of a due execution of the bond, from the proof of the handwriting of the subscribing witness; and he also adds, that the propriety of the reception of the evidence was not questioned.

This ruling of Mr. Justice *Heath* was also referred to by Mr. Justice *Bayley*, in *Doe* v. *Ridgway*, where he says "that the case of the subscribing witness seems to be founded on the principle, that the defendant ought not to be de-

prived of the advantage of such evidence of contradiction by the death of the witness."

Such is the state of the authorities on this subject, which are very limited indeed in point of number; and when it is considered in how qualified a manner the opinion of Lord *Mansfield*, the origin and foundation of the others, is expressed; and when it is recollected that both then, and at the time of the *Nisi Prius* trial, before Mr. Justice *Heath*, an opinion prevailed, (which is now properly exploded,) that any declaration *in extremis* was admissible, on the ground that the solemnity of the occasion was equivalent to a declaration on oath, which consideration certainly had an influence on the mind of Lord *Mansfield;* at least, it is impossible to say that there is any such weight of authority, however great our respect for the eminent judges whose names have been mentioned, as to induce us to hold, that this case is established and recognized as an exception from the great principle of our law of evidence,— that facts, the truth of which depends on parol evidence, are to be proved by testimony on oath.

If we had to determine the question of the propriety of admitting the proposed evidence, on the ground of convenience, apart from the consideration of the expediency of abiding by general rules, we should say that it was at the least very doubtful whether, generally speaking, it would not cause greater mischief than advantage in the investigation of truth. An extreme case might occur, as there seems to have done before Mr. Justice *Heath*, where the exclusion of evidence of a deathbed declaration would probably have been the exclusion of one mode of discovering the truth. The same may perhaps be said of all solemn assertions *in extremis* by deceased witnesses. But, on the other hand, if any declarations at any time from the mouth of subscribing witnesses who are dead are to be admitted in evidence, (and you cannot stop short of that, for no one contends that the exception is to be confined to deathbed declarations, and if so confined, the evidence would be inadmissible in the present case,) the result would be that the security of solemn instruments would be much impaired. The rights of parties under wills and deeds would be liable to be affected at remote periods, by loose declarations of attesting witnesses, which those parties would have no opportunity of contradicting or explaining by the evidence of the witnesses themselves.

The party impeaching the validity of the instrument would, it is true, have an equivalent for the loss of his power of cross-examination of the living witness; but the party supporting it would have none for the loss of his power of re-examination. We cannot help feeling, therefore, that it is at least very doubtful whether the establishment of such an exception would be productive of any advantage; and when the great benefit to the administration of justice, of abiding by general rules and acting upon general principles, is taken into consideration, we feel no doubt but that it would be inexpedient to sanction this additional exception to the established rule of evidence. We therefore think that the rule for a new trial must be discharged.

Rule discharged.

Exchequer.

LEVY *v.* CLAGGETT.

A writ of capias, on which proceedings to outlawry were afterwards taken, was delivered to the sheriff on the day the defendant went abroad, with a direction to return the writ *non est inventus*: and a judge's order was also obtained for the return of it in fifteen days; the Court refused to set aside the outlawry, except on the terms of paying the costs, and putting in bail in the alternative to pay the condemnation-money, or render.

HUMFREY shewed cause against a rule obtained to reverse the outlawry issued in this cause. The rule was obtained on two grounds: first, that the capias had been issued with a direction to the sheriff to return it *non est inventus*; secondly, that at the time the exigent was awarded, the defendant was beyond seas. The defendant's affidavit stated that he was abroad on the 29th of *April*, and that he did not go for the purpose of avoiding the process in this cause; that he returned to *England* before the proclamations, and was now in custody in this suit. Cause was shewn on an affidavit made by the plaintiff's attorney, which stated that the writ was issued on the 28th of *April*, and was delivered to the sheriff on the following day, on which day the defendant went abroad, (to the deponent's belief,) for the purpose of avoiding his creditors. A judge's order had been obtained, under the Uniformity of Process Act, to return the writ of capias in fifteen days.

J. Jervis, in support of the rule.—The general rule is, that an outlawry is irregular if the defendant is abroad at the time the exigent issued. *Bryan* v. *Wagstaff* (*a*). [*Alderson*, B.—That is the rule upon a writ of error being brought; but you apply by motion to set it aside, and the question is, on what terms that is to be done. In *Graham* v. *Henry* (*b*), a rule was made absolute to reverse an outlawry on the terms of paying the costs, and putting in bail in the alternative to pay the condemnation-money, or render; and the Court said it is in their discretion to direct on what terms the motion should be granted.] In that case, and in *Lewis* v. *Davison* (*c*), the proceedings appear to have been regular; but here the direction to the sheriff to return the writ *non est inventus* makes them irregular, and, if they are irregular, the outlawry ought to be set aside without payment of costs. *Pigou* v. *Drummond* (*d*). It is as much the privilege of the plaintiff that the writ of capias should be allowed to run four months. [*Alderson*, B.—The process to outlawry would be very slow, if the writ is not to be returned before the expiration of four months.]

Lord ABINGER, C. B.—The defendant was actually abroad at the time the writ was returned; and I do not see how he was damnified by that return. I think that the outlawry should be set aside on payment of costs, and putting in bail in the alternative; that will put the plaintiff in the same situation as if bail had been put in when the writ was returned.

The other judges concurred.

Rule accordingly.

(*a*) 5 B. & C. 314.
(*b*) 1 B. & Ald. 131.
(*c*) 1 Cr. M. & R. 655.
(*d*) 1 Bing. N. C. 554.

FARRAR *v.* BESWICK.

In an action of trover, the defendant pleaded justifying the taking of the goods under an execution against a third person, averring that the goods were his property and not the property of the plaintiff. The replication averred, that the goods were the property of the plaintiff, and not of the third person:—*Held*, that the plea was merely a special traverse of the plaintiff's property in the goods, and that upon evidence that the goods were the joint property of the plaintiff and the third person, the plaintiff was entitled to a verdict, such an interest being sufficient to enable the plaintiff to maintain trover, and the plea admitting a conversion.

TROVER for certain cattle. *Pleas*—first, that the cattle, &c. were not the property of the plaintiff, nor was he possessed of them as of his own property in manner and form, &c.; secondly, a justification under a writ of *levari facias* against the goods of one *Joshua Farrar*, averring that the said cattle were the cattle, goods, and chattels, of the said *Joshua Farrar*, and liable to be seized and taken as aforesaid, and not the property of the plaintiff. The plea went on to justify the conversion and sale of the cattle on the same ground. The plaintiff replied, taking issue on the first plea; and as to the second, that the said cattle in the said declaration mentioned were at the said time, when, &c. and still are, the cattle and property of the said plaintiff, and not the property of the said *Joshua Farrar*, in manner and form, &c.

At the trial, before *Parke*, B. at the last spring assizes for *Liverpool*, it appearing that the plaintiff and *Joshua Farrar* were joint owners of the property in question, the learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a nonsuit.

In *Easter* Term, *Alexander* obtained a rule accordingly.

Cresswell and *Wightman* shewed cause.—The conversion of the goods is admitted in the pleadings; and the only question raised is, whether the plaintiff had a sufficient property to enable him to maintain the action; and an undivided moiety as a joint tenant is sufficient for that purpose. *Stancliffe* v. *Hardwicke* (*a*). [*Parke*, B.—It is contended, on the other side, that the plea may be restricted to the moiety, justifying dealing with that as stated.] The plea is pleaded as an answer to the whole declaration. The defendant should have pleaded, shewing the interest of *Joshua Farrar* in the articles, and that he took them in execution to the extent of that interest. [*Parke*, B.—The question is, whether it is an informal plea denying a conversion, or a plea denying the plaintiff's property. I thought, at the trial, that the allegation as to the cattle being the property of *Joshua*, was mere inducement to a special traverse of the plaintiff's property.] It not only justifies taking of the whole, but it justifies a conversion of the whole, and a conversion of the plaintiff's share (*b*); and there is no question, therefore, whether a sale by one joint tenant, or by his authority, is a conversion as against the other half. The plea ought, in any point of view, to have set out specially the amount of interest of *Joshua Farrar*.

Alexander, contrà.—The substantial question raised by these pleadings is, whether the cattle were liable to be taken under the execution against *Joshua Farrar*. The declaration alleges them to be the property of the plaintiff, the plea of *Joshua Farrar*, and if on a traverse of the plaintiff's property it is sufficient to shew a joint interest to enable him to maintain his action, by the same construction a joint interest in *Joshua Farrar* must be sufficient to sup-

(*a*) 1 C. M. & R. 1 S. C. *ante*, vol. 1, p. 127. (*b*) Vide Wms. Saund, note 47 *h*.

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port the allegation of the plea, that the cattle are his property; and the plaintiff should have newly assigned, if he meant to contend that the sale of the cattle was an act which entitled him to maintain trover for his share. The sheriff was bound to take and sell the cattle; there is no mode of dividing a horse, and if the plaintiff's complaint is that the sheriff has sold a larger interest than he ought, the remedy is by a special action on the case.

PARKE, B.—At the trial, in the first instance, the defendant offered evidence to shew that the cattle were the sole property of *Joshua;* but in pursuing the inquiry, it appeared they were the joint property of the plaintiff and *Joshua*. I told the jury, if they thought so, they ought to find for the plaintiff, being of opinion that the plea was merely a special traverse of the plaintiff's property. I remain of that opinion. If the question rested on the traverse in the first plea, the question would have been whether the cattle were the plaintiff's property, and the defendant would not have been allowed to shew that there was a third person under whom he justified, who had a right or interest in them. I think it is impossible to construe the words of the second plea but as an allegation that they were the sole property of *Joshua*, as an inducement to a traverse that they were the property of the plaintiff. I do not say that if *Joshua* and the plaintiff were jointly entitled to this property, that the seizure and sale by the sheriff of the whole would be a conversion by him. It is unnecessary to give an opinion on that point. The replication re-asserts the allegation of the declaration of the plaintiff's property, and a sufficient property to maintain the action is shewn; on that ground I think the verdict proper, and the rule must be discharged (*c*).

BOLLAND, B. ALDERSON, B. and GURNEY, B. concurred.

Rule discharged.

(*c*) In the course of the argument, the learned judge referred to *Barton* v. *Williams*, 5 B. & Ald. 395, as throwing doubt upon the doctrine of what was a sufficient sale by one tenant in common to enable his co-tenant to bring trover.

DOE dem. GRAY *v.* STANION.

A tenant from year to year agreed to buy the freehold of the demised land; after the agreement of purchase, the purchase-money being unpaid, the landlord demanded possession; the tenant said he had bought the land, and he should keep it:—*Held*, first, that the agreement for purchase being not absolute, but conditional on a good title being found, it did not put an end to the yearly tenancy; and, secondly, that the assertion of a right to hold by the tenant, must be taken to have been made by him in his character of purchaser, and not as tenant, and therefore that it was no disclaimer.

EJECTMENT. At the trial, before *Bosanquet*, J. at the last assizes for the county of *Northampton*, it appeared that the defendant had occupied the premises in question as tenant, from year to year, to the lessor of the plaintiff, from the year 1828; and on the 2d of *September*, 1831, the defendant entered into a written agreement with him, in the following terms:—

"1831, *Sept.* 2d.—*Samuel Stanion* purchased an estate in the parish of *Corbey*, bought of *Robert Gray*, at the sum of 100*l*. Received on account 10*s*. Mr. *Robert Gray* is willing to let the sum lie, by paying 4 per cent."

The agreement was signed by both parties, and 10*s*. were paid as a deposit. On the 2d of *October*, 1835, the agent of the lessor of the plaintiff demanded

possession; the defendant said "he had bought the property, and would keep it; and he had a friend who was ready to pay the money for it;" on which the agent told him, that if possession was not delivered an ejectment would be brought. It was contended at the trial, on the part of the lessor of the plaintiff, that he was entitled to recover on two grounds: first, that the agreement of purchase put an end to the tenancy from year to year, and made the defendant tenant at will, and in that case the lessor of the plaintiff having demanded possession would be entitled to recover; and, secondly, that the refusal of the defendant, accompanied by a claim of right to hold, amounted to a disclaimer. On the other hand, the defendant contended that neither of these grounds was sufficient to determine the yearly tenancy. The learned judge directed a verdict for the plaintiff, giving leave to the defendant to move to enter a nonsuit.

Humfrey obtained a rule accordingly, against which

Waddington and *Mellor* shewed cause.—The agreement to purchase put an end to the tenancy from year to year; a new relation was created inconsistent with that tenancy, of which it operates as a surrender by operation of law. [*Parke*, B.—Where a party has been let in under an agreement of purchase, as he is not a trespasser, he has necessarily some lawful title, and the law gives him the least right which it recognizes as a legal title.] In *Daniels* v. *Davison* (*a*), Lord *Eldon* appears to have been of opinion that an agreement of purchase would determine a tenancy from year to year; it is analogous to accepting a new demise, which it is clear would be in law a surrender of the previous one. *Thursby* v. *Plant* (*b*), *Hamerton* v. *Stead* (*c*). [*Parke*, B.—You must shew that the agreement of purchase was an unconditional contract; but was it not conditional that the landlord should make a good title, and if that condition is not performed, does not the tenant retain his right? *Alderson*, B.—An agreement to purchase might, upon your argument, though never performed, operate as a surrender of very valuable interests: an agreement of purchase of a reversion of almost nominal value, would put an end to a long lease for years, without giving the lessee any equivalent.] Then supposing the agreement not to put an end to the tenancy, it is at all events determined by the disclaimer. Any claim of title is a disclaimer, which amounts to an assertion of a right to hold it by any other title than that conferred by the demise. The defendant set up his title as a purchaser, and claimed to continue to hold under that. By such a claim he forfeited his tenancy and right to notice to quit. B. N. P. 96. *Doe* v. *Williams* (*d*), *Bower* v. *Major* (*e*), *Doe* v. *Grubb* (*f*), *Doe* v. *Lord Cawdor* (*g*), *Doe* v. *Price* (*h*).

Humfrey, in support of the rule.—The tenancy was not determined by the agreement of purchase. It could not have been the intention of it, that the defendant was bound to take the land at all events, whether his landlord could give him a good title or not. In what a situation would a construction that such an agreement determined a demise place holders of valuable leases?

(*a*) 16 Ves. 252.
(*b*) 1 Wms. Saund. 236 (*a*).
(*c*) 3 B. & C. 478.
(*d*) Cowp. 622.
(*e*) 1 B. & B. 4.
(*f*) 10 B. & C. 816.
(*g*) 1 C. M. & R. 398.
(*h*) 9 Bing. 356.

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If they made such an agreement of purchase, they would be in the dilemma of either taking the title, whatever it might be, or of losing their interest as tenants, without any return at all but a doubtful right of action.

Nor is the plaintiff entitled to recover on the ground of disclaimer. The claim of the defendant to hold was not made in his capacity of tenant, but in his capacity of purchaser: the landlord, in demanding possession, demanded that to which he had no right under the demise; and he must be, therefore, taken to have made the demand as vendor, and the tenant to have answered him as vendee. In what the defendant said there was nothing inconsistent with his situation as tenant from year to year; it was, therefore, no disclaimer.

Cur. adv. vult.

PARKE, B. delivered the judgment of the Court.—In this case, which was an ejectment to recover a house, tried before my brother *Bosanquet*, at the last assizes for *Northampton*, a point was reserved for the consideration of the Court, as to the right of the plaintiff to recover without having given half a year's notice to quit. The defendant occupied, from the year 1828, as tenant from year to year, at four guineas annual rent. On the 2d of *September*, 1831, an agreement was drawn up between the lessor of the plaintiff and the defendant to this effect:—

"1831, *September* 2d.—*Samuel Stanion* purchased an estate in the parish of *Corbey*, bought of *Robert Gray*, at the sum of 100*l*. Received on account 10*s*. Mr. *Robert Gray* is willing to let the sum lie, by paying 4 per cent."

The agreement was signed by the parties, and 10*s*. paid.

On the 2d of *October*, 1835, the agent of the lessor of the plaintiff demanded possession from the defendant. The defendant said "he had bought the property, and would keep it; and he had a friend who was ready to give him the money for it;" on which the agent informed him that if possession was not delivered, he should bring an action. An action of ejectment was accordingly brought. The learned judge directed a verdict for the plaintiff, reserving the points. On the argument on shewing cause against the rule *nisi* for a new trial, it was insisted, on the part of the plaintiff, that a notice to quit was unnecessary, on two grounds; first, that by the agreement of the 2d of *September*, 1831, a new tenancy at will was created, which put an end to the tenancy from year to year, and that such tenancy at will was determined by a simple demand of possession from the tenant; secondly, that if the tenancy from year to year was not so determined, the defendant's declaration on the 2d of *October* to the agent of the lessor, amounted to a disclaimer. We are of opinion that neither of these reasons is sufficient to dispense with the usual notice to quit.

As to the first, there is no doubt but that if there be an agreement to purchase, and the intended purchaser is thereupon let into possession, such possession is lawful, and amounts at law, strictly speaking, to a bare tenancy at will. *Right d. Lewis* v. *Beard* (*i*). It is not, however, the agreement, but the letting into possession, that creates such tenancy; for the person suffered so to occupy, cannot, on the one hand, be considered as a trespasser when he enters; and, on the other hand, cannot have more than the interest of a tenant at will, the lowest estate known to the law. But where the purchaser

(*i*) 13 East, 210.

is already in possession as tenant from year to year, it must depend upon the intention of the parties, to be collected from the agreement, whether a new tenancy at will is created or not, and from what time. In this case, if the true construction of the agreement be, that from the date of it (or any other certain time) the defendant was to be absolutely a debtor for the purchase-money, paying interest on it, and to cease to pay rent as tenant from year to year, a tenancy at will would probably be created after that time, and the acceptance of such new demise at will, would then operate as a surrender of the interest from year to year by operation of law. But if the agreement is conditional, to purchase only provided a good title should be made out, and to pay the purchase-money when that should have been done and the estate conveyed, there is no room for implying any agreement to hold as tenant at will, in the meantime; the effect of which would be absolutely to surrender the existing term, whilst it would be uncertain whether the purchase would be completed or not. And this is strongly illustrated, by supposing such an agreement to be made by a termor for a long term of years, of considerable value beyond the reserved rent, in which case it would at once strike any one as impossible to give this effect to the agreement. In such a case, no one would doubt but that the intention was that the lease should not be given up unless the purchase was completed. Is, then, the contract in question a contract of this conditional nature to purchase for 100*l.*, provided a good title should be made and the estate transferred? We conceive that there is no doubt but that it is to be so construed; for, in the first place, in contracts for the sale of real estate, an agreement to make a good title is always implied, of which the case of *Souter* v. *Drake* (*k*) is a strong instance; and, in the next, it is out of the question to suppose that this defendant meant to be obliged to pay the purchase-money, without some conveyance of the estate, although subject to a mortgage for the purchase-money. For these reasons, we think that the tenancy from year to year was not determined in this case by the defendant's entering into this agreement. What the effect of such a contract would be in a court of equity, it is quite unnecessary to consider.

The remaining question is, whether that which passed between plaintiff's agent and the defendant, on the 2d of *October*, was a disclaimer, so as to supersede the necessity of a regular notice to quit.

In the earliest reported case on the subject, *Throgmorton* v. *Whelpdale* (*l*), it is said that such notice is necessary, unless the tenant have attorned to some other person, or done some other act disclaiming to hold as tenant to the landlord. In *Doe* v. *Williams* (*m*), Lord *Mansfield* says, where the possession is adverse, no notice is necessary; and in that case there had been an attornment, or what was equivalent, for the defendant defended as landlord to the tenant from year to year. But this rule is too narrow; and from subsequent cases it does not appear to be necessary that any act should be done as distinguished from a verbal disclaimer. A disavowal by the tenant of the holding under the particular landlord, by words only, is sufficient. Lord *Kenyon*, in *Doe* d. *Williams* v. *Pasquali* (*n*), says, that if the tenant puts his landlord at defiance, he might consider him either as a tenant or trespasser, and eject him without any notice to quit. And in *Brown* v. *Major* (*o*),

(*k*) 5 B. & Ad. 992.
(*l*) Bull. N. P. C. 96.
(*m*) Cowp. 622.
(*n*) Peake, N. P. C. 197.
(*o*) 1 Bing. 4.

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in the analogous case of a composition for tithes, the declaration of an occupier who refused to set out his tithes in kind, insisting that he was exempted by a modus, was held to be sufficient disclaimer of the composition, so as to dispense with half a year's notice to determine it; and in other cases in which the declaration of the tenant has been held insufficient, [*Doe* v. *Pasquali* (*p*), *Doe* d. *Lewis* v. *Cawdor* (*q*),] no question has been raised as to the necessity of some act being done by the tenant, as distinguished from a disavowal by word or writing.

But in order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant, or to a distinct claim to hold possession of the estate, upon a ground wholly inconsistent with the existence of that relation, which by necessary implication, is a repudiation of it. An omission to acknowledge the landlord as such, by requesting further information, will not be enough, as appears from the cases already referred to, nor will a mere refusal to pay rent, as appears from the case of *Doe* v. *Pasquali*. A refusal to deliver possession, or a declaration that he will continue to hold possession, cannot have that effect at a time when the landlord has no right to claim it, as was the case in this particular instance. The only point, therefore, remaining, is, whether the defendant saying that he had "bought the property and would keep it, and had a friend who was ready to advance the money," is, by necessary implication, a disavowal of the relation of tenant from year to year. We are all of opinion, that it is not because this is not a claim to the estate, on a ground necessarily inconsistent with the continuance of the tenancy from year to year. The defendant had a double right, to enforce his bargain for the purchase of the estate, and to continue in the meantime to hold it as tenant from year to year; and this declaration is, in truth, no more than an avowal that he should insist on his contract of purchase, and was ready to perform it. This appears to us to be quite consistent with the continuance, in the meantime, of the tenancy from year to year. We therefore think the rule *nisi* for a nonsuit must be made absolute.

Rule absolute.

(*p*) Peake, 196. (*q*) 1 C. M. & R. 398.

MUSPRATT *v.* GREGORY.

A boat was sent by the owner to certain salt-works belonging to a salt-manufacturer, and left a reasonable time in a canal on the premises for the purpose of being loaded with salt:—*Held*, (*Parke*, B., *dissentiente*,) that the boat was not privileged from distress.

Goods of a stranger on the land may be distrained for a rent-charge issuing out of it.

TRESPASS for taking a boat of the plaintiff. *Plea*—a justification of the taking as a distress for a rent-charge granted to certain parties, under whom the defendant justified as bailiff. *Replication*—that before any of the said times, when, &c., the plaintiff was, and thence hitherto hath been, and still is, a manufacturer and trader in certain alkalies, to wit, a certain alkali called black ash, and a certain other alkali called white ash; and during all the time aforesaid has exercised and carried on such manufacture, trade, and dealing, as aforesaid, to wit, at certain premises of him, the plaintiff, in the county of *Lancaster*; and during all the time aforesaid, he, the plaintiff, hath

from time to time made and manufactured divers great quantities of such alkalies, and dealt in and sold the same as aforesaid, which said manufacture, trade, and dealing, was a useful manufacture, &c., and of great benefit; and the plaintiff further says, that for the purpose of such manufacturing and making such alkalies, as aforesaid, great quantities of salt are required, which are used in the making and manufacturing such alkali as aforesaid; and that during all the time aforesaid, the plaintiff had occasion for and required great quantities of salt for such purposes aforesaid; and that the plaintiff, for a long time before any of the times when, &c., was used and accustomed from time to time to use and employ the said boat or vessel in the declaration mentioned, for the purpose of and in bringing, fetching, and carrying divers great quantities of salt to the plaintiff's premises, to be used by him in such manufacture as aforesaid, from the salt-works hereinafter mentioned, which said salt was, during all that time, from time to time, received in and by such boat in the said cut or canal at the place in which she was so seized, and taken aforesaid, and thence was carried in and by the said boat down the said cut or canal into a certain river or navigation, and thence by certain other rivers and navigations, to the plaintiff's said premises; and the plaintiff further says, that long before the said *F. Kemble* and *F. Lock*, or either of them, had any thing or any interest or rent in or out of the said premises in the plea mentioned, or any of them, and before the making of the said indenture of, &c. to wit, on the 1st of *April*, 1830, the said *W. Furnival*, being so as aforesaid interested in and possessed of the said premises in the plea in that behalf mentioned, made and erected certain salt-works, to wit, the said works in and upon the said premises in the plea mentioned, and near and close to the said place where the said boat was so seized as aforesaid; and the said W. F., to wit, then for the purpose of enabling all persons of this realm, who should have occasion to purchase salt at the said salt-works, to fetch the same therefrom, and to receive the same there, and to carry the same away in boats, and for the purpose of enabling the tenants and occupiers of the said premises and salt-works, to have the charge and loading of such boats, did make, dig, and cut, the said cut and canal in the plea mentioned, near and close and up to the said salt-works, and which said cut and canal communicated with a certain river or navigation, being a public highroad; and the said W. F., and the tenants and occupiers of the said premises and salt-works always, since the erection of the said salt-works, and the digging and making the said cut or canal, from time to time, made and manufactured salt there, to wit, on the premises in the plea mentioned, and sold and disposed of the same there, as an article of trade and merchandize, and delivered and supplied such salt so made to all persons desirous of buying and taking away the same in boats, at the said place in the said cut or canal, where the said boat was when she was so seized as aforesaid; and such persons have always, during the time last aforesaid, taken away the same in their said boats along the said cut or canal; and the plaintiff further says, that shortly before the said time, when, &c., in the declaration mentioned, having occasion for salt for the purposes of his said manufacture, he did, in order to get salt for the purposes aforesaid, send and take his said boat or vessel into the said cut or canal to the said salt-works, to a part of the said cut or canal, being the place where salt so made on such premises, as aforesaid, was at that time usually sold and delivered by the tenants and occupiers of the said salt-works and premises, to

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persons buying salt, and fetching and taking the same in boats from the said salt-works; and the plaintiff says, that at the time of the seizing and taking and carrying away the said boat, as in the said declaration mentioned, the said boat was in the said cut or canal for a temporary purpose only, and for the benefit of trade and manufacture, to wit, for the purpose of obtaining, receiving, and taking the salt from the said salt-works, and the tenants and occupiers thereof, as aforesaid, to be carried to the said manufactory and premises of the plaintiff, and there to be used in the said manufacture as aforesaid, and for the purposes of the plaintiff's trade and manufacture, as aforesaid; and that the said boat had not been or remained there, or upon any of the premises in the plea mentioned, for any long or unreasonable time in that behalf for that purpose, or for any other purpose; and the plaintiff, during all the time aforesaid, was a stranger and not privy to any of the parties or persons in the plea mentioned, or any or either of them in estate or otherwise, and had not, during any of the times aforesaid, any notice or knowledge of the said deeds, rent-charges, or arrears of rent, or any of them; and the said boat or vessel being in the said cut or canal for such temporary purpose as aforesaid, and for the benefit of trade and manufacture as aforesaid, the defendant at the said time, when, &c., wrongfully committed the said trespasses, &c. *Verification.*

General demurrer and joinder.—The marginal note stated that the point to be raised was, that, under the circumstances, the boat was not liable to be taken as a distress.

W. H. Watson, in support of the demurrer.—The boat was on the premises, and liable to distress; the circumstances under which it was there not being sufficient to bring it within any of the exceptions to the right of distress. The exceptions, and the ground on which they rest, are stated by Lord *Coke* (*a*):—"Valuable things shall not be distrained for rent, for benefit and maintenance of trades, which, by consequence, are for the commonwealth, and are there by authority of law; as a horse in a smith's shop shall not be distreyned for the rent issuing out of the shop; nor the horse, &c. in the hostry; nor the materials in the weaver's shop for making of cloth; nor cloth or garments in a taylor's shop; nor sacks of corn, or meale in a mill, nor in a market; nor any thing distrained for damage feasant, for it is in custody of the law, and the like." In argument by Sir *W. Blackstone*, in the case of *Francis* v. *Wyatt* (*b*), in whose favour the Court gave judgment, it was contended that no privilege of exemption from being liable to distress for rent in arrear could be claimed, but upon one of these foundations, viz., either the analogy to a common public inn, or the principle of general utility to the community. The first of the grounds is that referred to by Lord *Coke*, where goods are placed there by the authority of the law; that is, where the tenant is bound by law to receive them in the course of his business, and he acquires a lien upon them; and as to the privilege on this ground the rights of privilege and of lien are conterminous. It is clear that this case does not fall within the first reason given for the privilege; the miller was not bound to sell the plaintiff salt; nor is there any more ground to contend it comes within the other. There was no necessity that the boat should be abandoned by the servant of the plaintiff; and while in his possession, it would be exempt

(*a*) 1 Inst. 47 a. (*b*) 3 Burr. 1501.

from distress. The case of *Francis* v. *Wyatt* is a very strong authority on this point: there the trade of the tenant was that of a livery-stable keeper; and yet it was held, that a carriage sent to stand at the livery-stables was liable to distress. In *Gisbourn* v. *Hurst* (*c*), the rule laid down is, "that goods delivered to any person exercising a public trade or employment, to be carried, wrought, or managed, in the way of his trade or employ, are privileged." Here there was nothing to be done to the boat in the way of trade. The cases of *Thompson* v. *Masheter* (*d*), *Rede* v. *Burley* (*e*), *Adams* v. *Grane* (*f*), support the same doctrine. In *Gilman* v. *Elton* (*g*), the judgment of *Dallas*, C. J., expressly recognizes the ground of exemption to be that stated in *Gisbourn* v. *Hurst*. *Wood* v. *Clarke* (*h*) is a very strong authority for the defendant. It was there held, that though materials delivered by a manufacturer to be made into clothes are privileged, a machine sent with them to enable him to do so is not.

Crompton, contrà.—The ground of exemption from distress is that of public convenience; and as far as that convenience requires, the exemption ought to extend. The convenience of trade requires that carriages or vessels sent, as this was, to be loaded by the manufacturer, should be exempt from distress while on his premises for a reasonable time for that purpose. The instance of exception mentioned by the great text writers are not given as the only cases, but as illustrations of the principle upon which the exception depends; and the expression used by Lord *Coke*, of "the authority of law," does not mean that the law compelled the parties to receive the goods, but that the open carrying of a trade was an authority of law to place the goods there, in contradistinction to an express authority in fact. The recent cases have distinctly settled, that to give the exemption it is not necessary that the party should be bound to receive the goods. In *Adams* v. *Grane* (*i*), goods sent to an auctioneer were held to be privileged. The Court of Common Pleas decided, in *Gilman* v. *Elton* (*k*), that goods sent to a factor's were privileged in like manner; and yet, in neither of these instances, was the tenant obliged to receive the goods. The same observation applies to *Brown* v. *Shevill* (*l*), where it was held that the carcass of a bullock, which had been sent by one butcher to another to be slaughtered, was exempt. In the case of *Rede* v. *Burley* (*m*), the tenant would acquire no lien on the horse and the goods distrained; and the majority of the Court there held, that it is the purpose that gives the protection; "as a horse which carries corn to a market, and is put into a friend's house for the time,"—"and where a horse carries corn to a mill, and is tied at the mill doors during the grinding of the corn." The judgments of *Park*, J., in *Gilman* v. *Elton* (*n*), and of *Bayley*, B., in *Adams* v. *Grane*, directly support the same principle. The principal ground of the decision in *Francis* v. *Wyatt* (*o*), was that the chariot was then on the premises for a permanent purpose. *Gisbourn* v. *Hurst* (*p*) lays down the rule, that every person who carries on a trade offering to deal with all persons who come to him, is a common trader. It may also be submitted, that the goods

(*c*) 1 Salk. 250.
(*d*) 1 Bing. 283.
(*e*) Cro. Eliz. 549, 596.
(*f*) 1 C. & M. 380.
(*g*) 3 B. & B. 80.
(*h*) 1 C. & J. 484.
(*i*) 1 C. & M. 380.
(*k*) 3 B. & B. 75.
(*l*) 2 Adol. & Ellis, 138.
(*m*) Cro. Eliz. 549 & 596.
(*n*) 3 Burr. 1988.
(*o*) 1 Salk. 249.
(*p*) 1 Salk. 249.

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of a stranger cannot be distrained for a rent-charge, if put on the premises by the consent of the owner of the land; it must be conceded, however, that the case of *Saffery* v. *Elgood* (*q*) overrules the doctrine laid down in Com. Dig. Distress B. 2, that the goods of a stranger can in no case be distrained for a rent-charge.

W. H. Watson, in reply.—The argument of inconvenience, so much urged, does not apply in this case; there was no necessity that possession of the boat should be relinquished; the servant of the owner might have remained in charge of it. If a man were to take a wheelbarrow to a shop, and leave it there, it would be distrainable. *Brown* v. *Shevill* is no authority against the defendant; the exemption was there put on the ground that the carcass was at a butcher's for the purpose of being managed, and dealt with by him in the course of his trade. It is not here said any thing was to be done to the boat. The true ground of the decision in *Rede* v. *Burley*, seems to have been that the things distrained were in the actual occupation of the owner. Upon the other point, *Saffery* v. *Elgood* is a decisive authority.

The learned judges, having differed in opinion, delivered their judgments *seriatim*.

ALDERSON, B.—The question raised upon the demurrer to the replication in this case is, whether the boat, stated to have been distrained for rent by the defendant, was by law distrainable under the circumstances disclosed in these pleadings. [The learned judge stated the replication.]

The leading case upon this subject is that of *Simpson* v. *Harlopp* (*r*), in which Lord C. J. *Willes*, in delivering the judgment of the Court, goes very fully into the law on this point. He lays it down that that there are five sorts of things which at common law were not distrainable:—

1. Things annexed to the freehold.
2. Things delivered to a person exercising a public trade, to be carried, wrought, or managed, in the way of his trade or employ.
3. Cocks or sheaves of corn.
4. Beasts of the plough, or implements of husbandry.
5. Instruments of a man's trade or profession.

The three first classes are absolutely free and exempt at common law; and the latter *sub modo*, in case there be no sufficient distress without them. There are, however, other exemptions not there enumerated; first, chattels in actual use, or in the actual possession and presence of the owner himself—an exemption intended to prevent a breach of the peace; and, secondly, the instruments or vehicles of conveyance of goods privileged from distress, or brought to a public market or fair there to be sold.

Now, of the exemptions enumerated by Lord C. J. *Willes*, it is plain that only the second can be at all applicable to this case. We must first inquire, therefore, whether this boat is within that rule. It is a chattel brought by the plaintiff to a place, where, according to the pleadings, a public trade in salt is carried on, and it is there left for the temporary purpose of being loaded with that article; whilst it remains in that state, and before a reasonable time

(*q*) 1 Ad. & E!. 191. (*r*) Willes, Rep. 512.

for so loading it has elapsed, it is distrained for rent due to the landlord of the premises wherein the trade in salt is carried on. Such are the facts of the case.

The boat is clearly not within the description of goods delivered to a trader to be carried or wrought, (*i. e.* worked up into another form,) in the way of his trade or employ; for there is nothing to be done to it: it is not brought to be repaired or altered in any way.

Then is it delivered to be managed, in the way of the trade or employ of the person to whom it is so delivered?

In *Simpson* v. *Hartopp*, the word "managed" appears to be used as synonymous with "manufactured." But that is too limited a sense of the expression; for the Courts have held, that goods sent to a factor by a merchant are privileged from distress under this head. I think, therefore, that it extends both to the working up of goods from their unwrought state into a new form, as a manufacturer, and also to the dealing with the goods as articles of trade in their original or their wrought state as articles of commerce, as a factor: and the true principle seems to be, that where, in order to the exercising such a public trade at the place in question, it is necessary that the goods should be delivered into the custody of the person carrying it on there, the law, in consideration of the benefit which the commonwealth derives from the carrying on of the trade, protects from distress the goods so delivered.

This is the reason assigned in *Simpson* v. *Hartopp;* and in *Wood* v. *Clarke* the principal ground which Lord *Lyndhurst* assigned why the loom was not privileged was, that it was not necessary for the protection of trade that such privilege there should exist. Here, also, it is not necessary for the protection of trade, that the boat should be delivered into the custody of the person manufacturing and selling the salt. The trade may well be carried on at these salt-works, without the possession of the boat being parted with at all by the owner. If he retains possession of it, there is no doubt that it is privileged; but then it is for a totally different reason, viz., that the taking it would lead to a breach of the peace, and then the case falls within another exemption before pointed out. The instances found in the books, of the horse in the smith's shop, of the cloth sent to the tailor, of the materials sent to the weaver, of the goods sent to the factor, of the beast sent to the carcass butcher, are all cases of chattels, delivered to be dealt with by the third person in the way of his trade, under circumstances in which his trade cannot be carried on at that place unless the goods are so delivered.

It is, however, proper to advert to the last of the two exemptions before pointed out, in addition to those mentioned by Lord C. J. *Willes*. The exemption is where the thing distrained is the instrument of conveyance of goods, which are themselves privileged, or which are brought to a public fair or market; and this is another instance of the same principle, viz., a protection for the benefit and convenience of trade. The article must be conveyed, and it is privileged from distress; therefore, all things necessary for that purpose are privileged also. Thus the horse or carriage conveying goods is so privileged; and so also the basket or package in which they are enveloped, and the like. So, again, cattle going to or at a fair or market are privileged, and, as a consequence arising out of the necessity for their refreshment on their passage towards such fair or market, if distant, they have been

held to be privileged during any temporary agistment on the road (*s*). But these are all instances of a privilege arising as accessory to another privilege; and although we are not prepared to draw any distinction between the instrument of conveyance to, or that from, the place where the privileged goods to be thereby carried are situate, yet we think that the privilege is not to be extended to the conveyance sent for goods, which are not themselves privileged from distress. Now here it is abundantly clear, that the salt which was to be conveyed by this boat was not itself privileged from the distress; for it was the property of *Furnival* himself, and was therefore, as his property, clearly liable to be distrained for the rent due from him to his landlord. Nor can this case fall within the rule exempting the horse or carriage conveying, or which has conveyed, goods to a fair or market. There the privilege arises out of the advantage derived to the public, from the proper supply to that public place of resort and traffic. In *Fowkes* v. *Joyce* (*t*) it was held, that cattle in their progress towards *London* were privileged; but the Court appear to have proceeded on the ground that there was no solid distinction between the supply of a great city and the supply of a fair or market. But I am not aware that a shop carried on for the private profit of an individual, or that a horse bringing home goods from a fair or market, for the individual profit of the purchaser, has ever been held to be within this rule; nor can they, as I think, fairly be considered within the principles on which the rule appears to be founded.

I do not think we can or ought to decide this case upon what may appear to be expedient. If we adopt such principle of decision, we shall deprive the law of one great advantage, viz., certainty, for that which appears expedient to one, may be, in the opinion of others, very inexpedient. If this argument were well founded, it would have undoubtedly prevailed in the case of the livery-stable keeper, *Francis* v. *Wyatt;* but the Court there adhered, against their own views of expediency, to the ancient decisions; and subsequent experience has shewn that the so much dreaded consequences did not afterwards arise in practice.

Upon the whole, therefore, this case seems to me not to fall within any decided authority, nor within any of the principles upon which goods have hitherto been held privileged from distress; and, that being so, I think that the replication is insufficient, and that the demurrer must be allowed.

BOLLAND, B.—The question for the opinion of the Court in this case is raised upon a demurrer to the replication; and the point upon which we are called upon to decide is, whether the boat which has been taken, as and for a distress for the arrears remaining unpaid of certain annuities and yearly sums mentioned in the plea of the defendant, was liable to be distrained.

It may be laid down as a general rule, that all goods that are found by a landlord on the premises demised to a tenant, are liable to be distrained by the landlord for rent due to him in respect of such premises, whether the goods be the property of his tenant or of a stranger, provided they are not privileged by law from distress. Lord C. J. *Willes*, in *Simpson* v. *Hartopp* (*u*), (a case that was twice argued, and fully considered by the Court of Common

(*s*) 2 Saund. 290 a, note 7.
(*t*) 3 Levinz, 260.
(*u*) Willes, 512.

Pleas), states, in delivering the judgment of the Court, that there are five sorts of things which at common law were not distrainable:—

1. Things annexed to the freehold.

2. Things delivered to a person exercising a public trade, to be carried, wrought, worked, or managed, in the way of his trade or employ.

3. Cocks and sheaves of corn.

4. Beasts of the plough, and instruments of industry.

5. The instruments of a man's trade or profession.

The three first sorts were absolutely free from distress, and could not be taken by the landlord though there were no other goods. The two last were only exempt *sub modo*, when there was distress enough without taking them. Let us then look to the circumstances under which the boat in question was taken, in order to ascertain whether it can be legally brought within either of the five grounds of exemption.

The plaintiff contends that the boat was not liable to be distrained, because he says, in his replication, that he is a manufacturer of, and a trader in, alkalies, and that such manufacture is a manufacture of great public benefit; that great quantities of salt are required in the manufacturing such alkalies; and that he, as such manufacturer requiring salt for the purpose of his manufacture, sent and took his said boat to the salt-works mentioned in his replication; and that at the time of the seizing and taking the said boat, it was at the said salt-works for a temporary purpose only, and for the benefit of trade and manufacture, viz., for the purpose of obtaining, receiving, and taking salt, from such salt-works to his manufactory; and that the boat did not remain on the premises for any unreasonable time.

It appears to me to be clear that the boat of the plaintiff cannot be said to come within either of the first, third, fourth, and fifth rules of exemption; nor can it, but by an overstrained and forced construction—a construction that I do not think the Court can adopt—be brought within the second rule of exemption. If this be correct, it follows then that the non-liability to distress must rest upon some other foundation; and it has been contended at the bar, that it can be put upon the benefit to trade alone. I cannot, however, find any authority to support that position to the extent that is in this case contended for. Things used in the way of trade are, under some circumstances, not liable to distress: a horse standing in a smith's shop to be shod, or in a common inn; cloth or garments in a tailor's shop; materials for cloth in a weaver's shop; corn or meal sent to the mill or market (*x*); goods delivered to any person in the way of his trade, or to a carrier for hire. *Gisbourn* v. *Hurst* (*y*). But in each of these cases, the privilege from distress is put on other grounds than the mere benefit of trade. The reported cases that come nearest to the present are those of the yarn carried to be weighed at a private beam; if in the way of trade, *Rede* v. *Burley* (*z*); or of the horse that had carried corn to a mill to be ground, and during the grinding was tied to the mill door. In these cases, the goods and the horse taken were held to be privileged from distress for rent; but the Court, according to the Reports, appears to have mainly proceeded upon the ground of the goods being under the personal care of their owner at the time of the taking (*a*).

(*x*) Co. Lit. 47 a.
(*y*) 1 Salk. 250.
(*z*) Cro. Eliz. 596.
(*a*) Noy, 68; Cro. Eliz. 549; 1 Ld. Raym. 386; 3 Burr. 1498; 1 Bl. 483.

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The boat, in the present case, had no such protection; it was left by the owner; and the privilege contended for is put, as attaching to the boat, upon the benefit to trade only. As, therefore, it does not appear to me that the boat comes within either of the five rules of exemption laid down in Co. Litt. 47 a, and pointed out by the Court in *Simpson* v. *Hartopp*, as the owner had, by leaving the boat, taken away that protection which in *Rede* v, *Burley* was thrown round the goods, and was the ground upon which the Court held them privileged from distress, I am of opinion that the boat was legally distrained, and that judgment be for the defendant.

PARKE, B.—The facts of this case, as they appear on the pleadings, and so far as they are necessary to be stated in order to raise the point discussed before us, are these:—

On the lands out of which the annuity issued, the manufacture of salt was, at the time of the seizure, carried on; and the produce of the manufacture was there sold generally as an article of merchandize to all persons who chose to buy it and carry it away in their boats. The plaintiff's boat was lying in a canal on the same lands, in the place where the salt was usually sold and delivered to customers, and for the purpose of receiving on board salt by him intended to be bought; and, before the expiration of a reasonable time for that purpose, was distrained by the defendant. The fact that the plaintiff himself carried on a trade, and wanted the salt for the use of that trade, as alleged in the replication, I do not think it necessary to consider. It does not appear to me to give the barge a greater privilege than if it were sent by a person not a trader, although it is to be observed that in one case some of the judges mention the trade of the owner of the chattle as material. *Rede* v. *Burley* (*b*).

The question, then, is, whether the boat was, under these circumstances, privileged from distress. It is a point of some importance; for this is only one amongst many instances which may occur. Such would be the case of carts sent to be loaded in a wholesale warehouse or at a land-sale colliery, casks left in a brewery or distillery to be filled, and the like.

It is admitted, on both sides, that there is no decided case which is expressly in favour of the privilege; and, on the other hand, that there is none expressly against it. In order, therefore, to decide the question, we must ascertain what the principle is on which the exemption is founded, and it is to be collected from the authorities, and decided according to that principle.

Upon consideration of the authorities, it is clear that the principle of the exemption is the public good; that is, that all men may freely, and without interruption or danger of the loss of their goods, deal with those who carry on trades of business for the benefit of all indiscriminately; or buy or sell in fairs or markets, and thus supply themselves with the commodities of life. Such being the principle, it appears to me, that in order to give it full effect, we ought to hold that not merely chattels are privileged from distress which are placed on the lands chargeable with it, in order to have something done with them by the person there carrying on his trade, but that all are exempt which are necessarily placed there, and whilst they are there, in order to enable their owner to enjoy the full benefit of the trade or business as it is there carried on.

(*b*) Cro. Eliz. 596.

It is not, I think, because the chattels are to be worked upon the lands so chargeable, (though that is the most familiar case,) but because they are necessarily placed on those lands, that the privilege is allowed by the law, and if goods are necessarily placed, in order to enjoy the benefit of the trade, it is immaterial what is to be done with them.

I proceed to shew that this is clearly the principle on which the exemption is founded.

The proposition which is referred to in some of the cases as a rule, and is first laid down in *Gisbourn* v. *Hurst*, and adopted by Lord C. J. *Willes*, in *Simpson* v. *Hartopp* (*c*), is, "that those goods are privileged which are delivered to any person exercising a public trade or employment, to be carried, wrought, or managed, in the way of his trade or employ."

This proposition, though perfectly correct affirmatively, and quite comprehensive enough to include the cases then under consideration, is confessedly too narrow; for it does not include it in many cases, in which the privilege clearly obtains, as, for instance, goods sent to a market, or a horse or vehicle sent with goods there, or sent to or waiting for goods to be brought from the place where the trade or employment is carried on. The rule must, therefore, be couched in more comprehensive terms. I would observe, however, that the present case may possibly fall within this narrower definition, if the boat was delivered to and to be loaded by the trader: but I incline to think it is not sufficiently averred in the replication, that the persons carrying on the salt-works were to load the boat, or to have possession of it; and, therefore, the boat cannot be said to be in any way delivered to the traders to be by them "wrought or managed."

I may also observe, in reference to one part of this proposition, that there appears to be no dispute (*d*), but that the word "public" is to be understood to refer to every trade or employ carried on generally for the benefit of any persons who chose to avail themselves of it, as distinguished from a special employment by one or particular individuals, although it be not "public" in the sense that all the king's subjects have a right to insist on the trader accepting their goods, and that an indictment or action would lie if he did not; a predicament which is peculiar to this day to an innkeeper, or perhaps a carrier also, though Lord *Holt*, in 12 Mod. 484, considered it to belong to all other trades which a man professed to carry on for all persons indiscriminately.

I now proceed to consider the authorities.

The first is the Year Book, 22 Ed. 4, 49.—*Brian*, who was chief justice, seems to put the privilege from distress on the ground that the goods were with the trader by authority of law; that is, that the trader was bound to receive them, and had a lien on them, a rule which would unquestionably be too limited at this time; and, indeed, the chief justice was only citing the cases of exemption from distress, to shew that such chattels were not distrainable, however long they were left on the lands demised, on the ground of the obligation to receive, and the consequent lien.

In the next case, 7 Hen. 7, 1 b, the Court say, that "things in a common inn cannot be distrained, for the prejudice it would cause to the commonweal, nor in a market or fair where things are taken to be bought." Here the

(*c*) Willes, 514. (*d*) See *Adams* v. *Grane*, *Brown* v. *Shevill*.

benefit to the public from free communication, and buying and selling, is clearly avowed to be the principle on which the exemption proceeds. So in the third case, which is *Brooke's*, Abr. Distress, 251, pl. 70, which is as follows:—"Vide libro *Rastell*, que stuffe mise ove tailor, fuller, shereman weuver, miller, et hujus modi ne seront distrenie, car ceux artificiers sont pour le common weale, et eadem lex alibi deequo in communi hospitio." It then goes on to say, that the artificers and innkeepers have a lien on the goods.

The rule laid down by Co. Litt. 47 a, is in these terms. After stating that a distress must be of things whereof a valuable property is in somebody, he says, "Valuable things shall not be distrained for rent for benefit and maintenance of trades, which by consequent are for the commonwealth, and are there by authority of law, as a horse in a smith's shop shall not be distrained for the rent issuing out of the shop, nor the horse, &c. in the hostry, nor materials in the weaver's shop for making of cloth, nor cloth or yarn in a tailor's shop, nor sacks of corn and meal in a mill nor in a market, nor any thing distreined for damage feasant, for it is in the custody of the law, and the like." This rule certainly does not confine the privilege to goods delivered to another to be carried, wrought, or managed by him in the way of his trade. It states the principle of the exemption to be the common good, for the maintenance of trades, and it then gives illustrations of that principle, many of which are cases of goods so delivered, but not all, for the horse in the hostry, and goods sent to a fair or market, are not so delivered.

Lord Chief Justice *Gilbert* on Distresses, p. 35, states the rule to be as follows:—"Things sent to public places of trade, as cloth in a tailor's shop, yarn in a weaver's, a horse in a smith's forge, and the like, are not distrainable; for it is of public utility that the shops of traders should be privileged from the lord's distress for his rent; for otherwise, no man could supply himself with the necessaries of life without the danger of losing them for another's debt; and therefore the landlord cannot distrain these things for the rent of the shop." Mr. Justice *Blackstone*, in 3 Comm. 7, adopts pretty nearly the language of Lord Chief Justice *Gilbert*:—"Valuable things in the way of trade shall not be liable to a distress, as a horse standing in a smith's shop to be shod, or at a common inn, or cloth at a tailor's house, or corn sent to a mill or market; for all these are protected, and privileged for the benefit of trade, and are supposed, in common presumption, not to belong to the owner of the house, but to his customers."

The principle upon which the exemption is founded appears, I think, therefore, with great distinctness, from these authorities, to be the protection of trade, that is not directly for the encouragement for the traders themselves, but in order that all the king's subjects may freely enjoy the benefit of trading with them, and supply themselves with the necessaries and commodities of life; and where the expression is used that "goods are deposited by authority of law," I take the meaning to be, that in the case of trades which are public, (in the sense in which I consider that term to be used,) and of public market, the law gives authority to all to bring those goods on the land in which such trade or market is carried on, by implication from the fact of its being so carried on for the use and benefit of all persons; and that the principle of the rule is the public good; and the freedom of commerce is recognized in several

modern cases; among others, those of *Gillman* v. *Elton*, and *Thompson* v. *Mashiter*.

If this be the principle of the rule of exemption, it seems to be inconsistent with the established mode of judicial decision to lay down a rule which is to include one class of goods only which fall within the mischief which the law is meant to remedy, and exclude another equally within the same mischief, merely because there is no case in which it has yet been held that such goods are privileged. A reference to the modern cases, as well as the language of the text-books themselves, shews that the early instances—those of innkeepers, smiths, tailors, fullers, weavers, and millers, are treated only as examples of the rule, not, as has been observed by Mr. Justice *Park* and Mr. Justice *Richardson*, in 3 B. & B. 82, as limiting or comprehending the whole exception, but merely by way of illustration; and accordingly the exception has been allowed in cases within the same mischief, such as factors(*e*), wharfingers(*f*), auctioneers(*g*), and, finally, carcass-butchers(*h*); in all which cases, goods are necessarily placed in their hands; necessarily I mean in this sense, that they must be placed there, if the public who choose to become their customers are to have the full benefit of those trades in the mode in which the traders choose to carry on their trades, and have held themselves out to the public as carrying it on; for in most of the established instances of exemption, it is not a matter of absolute necessity that the customer should deliver his goods into the hands of another. He might send for a tailor, or smith, or weaver, or carcass-butcher, to his own house, and he might sell his goods by auction or otherwise on his own premises; but if he chooses to employ the trader in the mode in which he carries on his trade, he cannot help placing the goods in his possession. If, then, goods in the hands of such traders are exempt when necessarily placed on the premises charged with the rent, in order to enable all persons to have the benefit of the trade there carried on by the working or managing the goods; and that, for the good of the public, and on the principle that it is to be protected; it seems to me, that all goods ought equally to be exempt, upon the same principle, when necessarily placed there in order to secure to all persons the benefit of such trade, though it may not be received in the same way. The ground of the exemption is not that the goods are to be worked up or managed, but that they are necessarily to be placed on the premises of the trader in the way of his trade, if that trade is to be made available to the public. What is to be done with them is immaterial.

In the present case, the carrying on of the trade in the mode in which the salt manufacturer held himself out as carrying it on, that is, by selling salt to all who should send their boats to his works, necessarily required, in order to enable the public to avail themselves of the trade, that they should send their boats there; and if so, it seems to me, that, upon the principle of protection of trade for the benefit of the customers, the boats sent for that purpose were not liable to be distrained. If they were, it would follow, that the salt, if loaded on board, would be distrainable also, for no distinction could be made. It is no objection in my mind, that the owner of the boat might possibly, if he pleased, have brought himself within another exemption from distress, founded

(*e*) *Gilman* v. *Elton*, 3 B. B. 75.
(*f*) *Thompson* v. *Mashiter*, 1 Bing. 283.
(*g*) *Adams* v. *Graves*, 1 C. & M. 380.
(*h*) *Brown* v. *Shevill*, 2 A & Ellis, 136.

on an entirely different principle, by keeping the boat in the actual possession of himself or his servants during the whole time it was placed on the premises charged with the rent. I can find no trace of authority for saying that the privilege of exemption for the benefit of trade has ever been limited to those cases in which the owner of the chattel could not have done so; on the contrary, in the case of the blacksmith, it is clear, that the owner of the horse might have waited and kept watch during the time that his horse was being shod, and yet it is one of the established cases of exemption. In other acknowledged instances of exemption, the same might have been done, though with more inconvenience. If a coat were delivered to a tailor to be mended, would the privilege depend on the length of time which the repairs would require, and would it cease to exist if the time was so short that the owner might have conveniently waited? I conceive that this circumstance makes no difference; and nowhere is it said, that the privilege is to be confined to those cases in which the owner could not conveniently have kept possession during the time that the chattel was deposited on the lands charged with the rent. The exemption was introduced for the freedom of trade, and the benefit of the community; that principle requires that the goods should be protected when placed on the premises of the trader, without imposing on the owner the inconvenience of keeping a constant watch over them; and I think, for the reasons above given, it applies to every case in which a chattel is necessarily brought on the premises of the trader in order to enable the owner to enjoy the benefit of the trade.

I have before observed, that there is no authority expressly deciding against the privilege as I have stated it, nor is there any which is even impliedly against it, the only modern case in which the privilege has been held not to exist was that of *Wood* v. *Clarke* (*i*), in which it was decided, that stocking-frames sent with materials to a weaver were not exempt; for it was properly held, that the fact of the frame and materials being sent together made no difference, and that it was not necessary for the protection of trade that the privilege should exist with respect to implements of trade, whether sent by the employer or hired or borrowed from another.

For these reasons, I am of opinion, that the plaintiff is entitled to our judgment.

Lord ABINGER, C. B.—I am of opinion that the judgment ought to be for the defendant. By the general rule of law, all goods found upon the premises of a tenant who is indebted to his landlord for rent are liable *primâ facie* to distress. That is the general rule. The courts of justice have engrafted upon that rule certain exceptions, and by those exceptions, which are clearly established, we are bound. The question in this case is, whether this is one of the exceptions? Now it is not the exception of the goods being in the personal possession of the party to whom they belong. That is one of the exceptions, and it is founded on a paramount rule that there shall be no exercise of any right which is accompanied with the danger of breaking the public peace. In that respect the goods are protected, not only if they belong to a stranger, but if the tenant himself is riding a horse on his own premises, that is not the subject of distress, for the same reason. Another exception is, where the goods are

(*i*) 1 C. & J. 484.

going to, or perhaps coming from, a public fair or market, to which all mankind are invited or supposed to go for the immediate purpose of their own traffic. A third exemption, within which it is attempted to bring the present case, is where the trade is of such a nature as that the goods which are employed on the premises are wrought or manufactured, or that something is done with them there. Now, looking at every one of the cases in which that exception has been acknowledged or established, it will be found that the trade itself consists in dealing with other men's goods. Take the familiar example of the blacksmith's shop. The landlord there does not let to the blacksmith his shop that he may shoe his own horses only, but takes a rent from the man for exercising a trade which consists in shoeing other people's horses. If the landlord were allowed to distrain the horses sent to be shod in that shop, he would be in fact destroying the trade for which he was receiving rent. So in the case of a tailor. Formerly the practice was not for tailors to furnish their customers with the goods themselves, but to receive the cloth and work it up into garments. Therefore a tailor was supposed to come within that rule, for his trade was understood to consist in working up other men's materials. So if the wharfinger, whose trade consists in receiving and accepting as a deposit other men's goods, and not his own. So of a factor, who has no goods of his own to carry on his trade, and whose trade, therefore, consists entirely in dealing with other men's goods. Now I cannot see that this case is similar to any one of those. This is the case of a boat being found upon the premises of a tenant; the boat is sent there for the purpose of receiving a cargo of salt, but the cargo not being ready, the boat is left on the premises, not in the possession of the plaintiff. Then it is like any other goods upon the premises. The boat was not sent there for the purpose of being repaired, in which case I do not know that the principle would not extend to a boat-builder under certain circumstances; neither did the trade which the tenant carried on consist in dealing with other men's boats or property. I do not agree that it was necessary to the trade that other men's boats should come there; nor do I see, that if the cargo of salt had been shipped into the boat, and allowed to remain on the premises, not in the possession of the plaintiff, it would have been free from distress. If the cargo itself would not, why should the boat be? There is no case that I know of in which goods have been held to be liable to distress where the carriage it exempt; therefore, in this case, as the salt itself was not exempted, so, I say, the boat was no more exempted, for the boat is but the adjunct, and follows the same rule as the goods loaded in the boat may be bound by. It may be true, that there might be more public convenience in the rule suggested by my brother *Parke* than in the other; I do not profess to have any opinion upon that subject; and I am afraid of trusting to my own judgment of the public good as a principle upon which we are to make rules, or to engraft exceptions to a well-defined and known law. In a case perfectly new—to which the law furnishes no analogy—where the judges are called on first to establish a rule, we must, according to our own imperfect lights of public convenience, advert to it; for such is the nature of the law of *England*, and indeed of the law of all countries, that cases not provided for by the contemplation of the legislature, must, as they arise, be determined by the good sense of the judges, in analogy, as far as they can, to the former cases; and if that analogy is not perfect—if it cannot be traced satisfactorily to the understanding so as to find some principle established by cases or rules

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which may meet the immediate case—then you are at liberty to consider which is the safest course to adopt for the public convenience; and you must exercise your own limited judgment as to what may be most for the public convenience. It appears to me, that this case does not fall within any one of the exceptions I have adverted to, and that there is no decided case analogous to it. Every one of the excepted cases is one in which the trade consists in dealing with other men's goods. That being the principle, it appears to me that I must agree with the other learned judges that the judgment should be for the defendant.

Judgment for the defendant.

HART *v.* LEACH.

The 57 G. 3, c. 93, s. 6, enacts, "that every broker or other person who shall make and levy any distress whatsoever, shall give a copy of his charges, and of all the costs and charges, of any distress whatsoever, to the person whose goods were taken:—*Held*, that this statute does not apply to the landlord, unless he interfere personally in the distress.

The costs of the distress in the above statute are not confined to the actual distress, but include the subsequent costs of appraisement and sale; per *Parke*, B.

CASE for an irregular distress. The second count of the declaration, after alleging that the defendant had seized goods of the plaintiff as, for, and in the name of a distress for rent, to wit, 20*l*., due from the plaintiff to the defendant for certain tenements and premises, went on to aver that the defendant thereby took an unreasonable distress for the said arrears of rent, and that a small part, to wit, one-fourth, thereof, then was of sufficient value to have satisfied the said distress, and all expenses of the same, and of the sale and appraisement thereof. And the plaintiff averred, that the defendant did not give to the plaintiff, or leave at the chief mansion-house, or most notorious place on the said premises, notice of the said distress, or of the cause of the said taking; and the defendant did not give a copy of his charges, and of all the costs and charges of the said distress, or of any part thereof respectively, to the plaintiff; and the defendant therein respectively wholly made default, against the form of the statute in such case made and provided. The fourth count was for taking an unreasonable distress, for not causing the goods to be appraised, for not selling for the best price, and for not leaving the overplus in the hands of the sheriff, undersheriff, or constable, for the use of the plaintiff. And the plaintiff averred, that the defendant did not give a copy of his charges, and of all the costs and charges of the said distress, or of any part thereof, signed by him, to the plaintiff; and that the defendant, in all the said several notices respectively thereinbefore in that count charged upon him, then wholly made default; against the form of the statute in such case provided. The sixth count was nearly the same as the fourth.

The defendant pleaded to each of these counts, so far as related to the defendant's not giving a copy of his charges, and of all the costs and charges of the said distress, that the distress was made by the defendant's direction, as landlord of the said tenements, and not personally by him, but by one *Thomas Edlin*, being a broker, and a broker of the defendant in that behalf, and who, as such broker, made and conducted such last-mentioned distress for the defendant; and that the defendant did not otherwise make or interfere in the distress; and the said charges and costs were the charges and costs of the said *Thomas Edlin*; concluding with a verification.

Demurrer, assigning for cause, that, as the defendant, as landlord, caused the distress, he thereby made himself a party thereto, within the meaning of the statute 57 G. 3, c. 93, s. 6; and that, as no bill of the costs and charges

of the distress was given by the defendant or by his broker, the defendant as landlord was liable for the default.

Joinder in demurrer.

The points stated for argument in the margin were, the causes of demurrer specially stated, and that the plea did not deny that the defendant personally interfered in the distress, or that he made or interfered in the appraisement or sale personally or otherwise.

Mansell, in support of the demurrer.—By the 57 G. 3, c. 93, s. 6, every broker making a distress is bound to give a copy of his charges, and of the costs of the distress, to the person whose goods are taken. The defendant pleads, as to the second and fourth counts, which are founded on this statute, that the distress was not made by him personally, bnt by a broker. But the act applies equally to the landlord. [*Parke,* B.—If the landlord goes with the broker, he is bound to give a copy; but the question is, whether, when he acts only by giving to a broker the power of distraining, he ought to give a copy.] It is submitted, that this statute must be construed like the 2 W. & M. sess. 1, c. 5, s. 1, in which the "party distraining" is mentioned, under which the landlord has always been held liable for any irregularity. Therefore, in this case, the landlord, having carried on the distress to appraisement and sale, and being in fact the party distraining, he would be liable to those costs, whether incurred by the broker or himself. The distress, therefore, was really made by the defendant himself. [Lord *Abinger,* C. B.—You say that it would be consistent with this plea that, although the defendant has not interfered in making the distress, he might have gone next day, and directed the goods distrained to be sold.] Just so. He does not deny that the costs and charges incurred are his.

Channell, in support of the pleas.—The question is, whether this act applies to any other than the broker employed. Each separate complaint in the declaration must be considered as a separate count, and one breach cannot be supported by reference to another breach. Here the distress is the principal subject matter, and each complaint may be referred to that; but each complaint arising out of the principal must stand by itself. We have answered one complaint as to not giving a copy of the costs and charges of the distress; and if it is objected that the defendant may have interfered personally in the distress, at a subsequent stage of it, that ground should have been taken as special cause of demurrer. [Lord *Abinger,* C. B.—The count states that the defendant did not give a copy of his charges, and of all the costs and charges of the said distress; and if the word distress raises the question as to all the stages of the distress on the declaration, why does it not on the plea? *Parke,* B.—The meaning of costs of distress is, the costs of seizing, appraising, and selling, and the defendant has used it in that sense.] That being so, the only question is, whether the statute applies to any one but the broker.

Mansell replied.

Lord ABINGER, C. B.—As the defendant has covered the complaint in the declaration as to the distress by saying that he did nothing but by the broker, I think the only question before us is on the construction of the statute. The second section requires the party (if ordered by a justice) who shall have levied any other or greater charges than those mentioned in the schedule, to pay the

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penalty. That clearly must mean the broker making the levy, and not the landlord, who takes no part in it. In like manner, I think the 6th section only applies to the broker actually making the distress.

PARKE, B.—I think the statute only applies to the broker who makes the distress. The act (*a*) says, "that every broker or other person who shall make and levy any distress whatsoever, shall give a copy of his charges, and of all the costs and charges, of any distress whatsoever, signed by him, to the person on whose goods and chattels any distress shall be levied." This clearly means the broker's charges, and his only, and all his charges only; therefore that person is not to confine the costs of the distress to the actual distress only, but must include the subsequent costs of appraising and the like. The plea, I think, must be taken to mean that the defendant did not interfere in any part of the distress from beginning to end.

BOLLAND, B., and GURNEY, B., concurred.

Judgment for the plaintiff.

(*a*) 57 G. 3, c. 93.

IN THE EXCHEQUER CHAMBER.

[IN ERROR FROM THE COURT OF EXCHEQUER.]

NEALE *v.* MACKENZIE.

By parol, a dwelling-house and premises were demised for a year. The lessee "accepted the said lease, and by virtue of the demise entered upon the demised land." Before and at the time of the demise, eight acres, included in it, had been demised to a third party, in whose possession they were, so that the lessee could not, and did not, enter upon them.—*Held*, that the demise was altogether void.

A WRIT of error having been brought upon the judgment of the Court of Exchequer (*a*) in this case, it was again argued in the vacation after last *Hilary* Term by *Bompas*, Serjt., for the plaintiff, and *Cleasby*, for the defendant.

After taking time to consider, the judgment of the Court was, in the course of this term, delivered by

Lord DENMAN, C. J.—This is an action of trespass for entering the plaintiff's dwelling-house, and taking his goods.

The declaration is dated the 25th of *April*, 1834. The defendant, on the 24th of *May*, 1834, pleaded that he, being seised of the dwelling-house and certain other premises, demised the same to the plaintiff for one year from the 25th of *June*, 1833, at the rent of 70*l.* payable quarterly; that the plaintiff accepted the lease, and by virtue of the said demise entered into and upon the said demised premises, and thereupon became, and yet was, possessed thereof for the said term so granted to him as aforesaid, and until the 25th of *December*, 1833, and from thence until and at the time when, &c. held and enjoyed the dwelling-house and premises by virtue of the said demise; that on the said 25th of *December*, 1833, 35*l.* of the rent was in arrear; wherefore the defendant entered and made a distress for the same.

The plaintiff, on the 6th of *December*, 1834, replied, that one *Adam Charlton*, before the demise in the plea mentioned, from thence, and still was, in posses-

(*a*) See the report of this case, vol. 1, p. 119, and the note p. 125, in which the reporter ventured to doubt the correctness of the decision; for reasons which, among others, are assigned by the Exchequer Chamber for reversing it.

sion of eight acres of land of the said demised premises, under and by virtue of a demise theretofore made by the defendant to him, which demise was then, and from thence had been, and still was, in full force and undetermined, whereby the plaintiff did not, and could not, enter into the possession of, or hold or enjoy the said last-mentioned land so being parcel of the demised premises in the plea mentioned; and although he had been willing and desirous of entering, he had been kept out of possession by *Adam Charlton*, by virtue of the demise to him, and the plaintiff had been prevented from holding and receiving the profits.

The rejoinder alleges, that the plaintiff, at the time of his entering on the demised premises, had notice that *Adam Charlton* was in possession of the eight acres as tenant to the defendant under a demise for a term then unexpired.

To this rejoinder there is a special demurrer for inconsistency with the plea, and departure therefrom.

The question to be determined is, whether the replication be an answer to the plea?

It has been argued, that the impediment to the plaintiff's obtaining possession of the eight acres demised to *Adam Charlton* by the defendant previously to the demise made to the plaintiff is in the nature of an eviction. On one side it is contended, that it is analogous to an eviction by title paramount, the right of *Adam Charlton* being prior to the demise made by the lessor, and to the title acquired under that demise by the lessee; and on the other side, that it is analogous to an eviction by the tortious act of the lessor, since the impediment arises from the wrongful act of the lessor himself in demising land which he had already parted with, and not to be distinguished in principle from the case of an entry upon the lessee under a demise made by the lessor to a stranger immediately after possession taken by the lessee.

If the former of these views be adopted, the rent will be apportionable, and the distress justified by the plea; for it is clear that a person may distrain for apportionable rent; and if the defendant was entitled to distrain at all, the action of trespass cannot be maintained. If the latter view be correct, the defendant was not entitled to distrain at all, so long as the plaintiff was kept out of possession of any part by his wrongful act.

But we are of opinion, that the impediment to the plaintiff's taking possession in this case is not analogous to an eviction; for it appears to us that no interest in the eight acres previously demised to *Adam Charlton* passed to the plaintiff by the demise subsequently made to him. The demise to *Adam Charlton* covered the whole time during which the rent distrained for accrued.

But it has been supposed, that notwithstanding the demise to *Adam Charlton*, by which the defendant had parted with his right of possession in the eight acres, the plaintiff, by his subsequent lease, took an *interesse termini* in these eight acres for the period of his own lease, viz., one year, so as to give him a right to a term for all that period, and to the possession on the determination of the prior lease by efflux of time, or by any other lawful mode whenever, and in whatever way, it should be determined; and that the existence of the prior demise being the impediment by which alone the plaintiff was prevented from obtaining possession under the demise to him, the case must be governed by the same principle as that of an eviction by title paramount; and if any interest in the eight acres did pass to the plaintiff under the demise to

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him, we might possibly be disposed to accede to this view of the case, considering that eviction by title paramount means eviction by a title superior to the titles both of lessor and lessee, against which neither is able to make a defence.

It appears to us, however, upon authority which we do not feel ourselves at liberty to dispute, that the demise to the plaintiff of the eight acres in question was wholly void.

It has been already observed, that the demise to *Charlton*, made previously to the demise to the plaintiff, covers the whole of the plaintiff's term, or at least the whole period for which the distress was made. Now it is expressly laid down in *Bacon's* Abr., Leases, (N.) (which is to be considered as the language of Lord Chief Baron *Gilbert*,) as follows:—"If one make a lease to A. for ten years, and the same day make a parol lease to B., for ten years, of the same lands, this second lease is absolutely void, and can never take effect, either as a future *interesse termini*, or as a reversionary interest, though the first lessee should forfeit or otherwise determine his estate, or though the first lease were on condition, and the condition broken within ten years; neither shall the lessor have the rent reserved upon such second lease, but such second lease is absolutely void as if none such had been made. The reason whereof is, because the first lease being made for ten years, the lessor, during that time, had nothing to do with the possession, or to contract with any other for it; and the second lease being made the same day, and for no longer term than the first ten years, would not pass any interest as a future *interessi termini* certainly, for the first lessee had the whole interest during that time; and his forfeiture and determination of it sooner, which was perfectly contingent and accidental, shall never make good the second lease as a future *interessi termini* where, at the time of making thereof, it was absolutely void for want of a power in the lessor to contract for it; and as a reversionary interest it cannot be good, for want of a deed." And a little further on, "But now if such second lease had been made for twenty years, then it had been good as a future *interessi termini* for the last ten years, and void for the first ten years, for the reasons before given; but for the last ten years it had been good, because, when the first ten years were elapsed, the second lessee might then execute and reduce into possession by entry, as well as if it had been at first made in possession; for it had been good for the whole twenty years if the first lease had not stood in the way, and that can stand in the way no longer than it continues, and therefore, by its termination, lets in the second lease; but as a grant of the reversion, such second lease could not be good, for want of a deed, for the reasons before given; neither could any attornment help it, or let in the second lease till the first ten years ran out by effusion of time." And afterwards it is said, that if, after a lease for ten years, a second lease by deed-poll were made for twenty years, it might take effect with attornment as a grant of the reversion, or if no attornment could be had, "yet it would enure as a future *interessi termini* for the last ten years, and would be absolutely void for the first ten years, as much as if it had been made by parol."

It has been remarked, that the doctrine here laid down is derived from the argument of counsel in the case of *Bracebridge* v. *Clowse*, in Plowd. 421; but it may be answered, that although the matter introduced into *Bacon's* Abridgment is first distinctly found in the argument set forth at length in *Plowden*, it now stands upon the authority of Lord C. B. *Gilbert*. Moreover, the point

immediately under consideration, in this case, is confirmed by the opinion of *Gawdy*, J., in *Dove* v. *Wilcott*, Cro. Eliz. 160, who says, "If a lease be made for two years, and after the lessor let the land for four years, this is but a lease for two years, although the first lessee surrender, for he had no power to contract for the first two years at the beginning; but otherwise, when the estate is determinable upon an uncertainty," and cites Plowd. Comment. *Smith* and *Stapleton*'s case, which is the case where the argument is fully stated, fo. 432.

It may be remarked, also, that in *Comyn*'s Digest, title Estates (G. 13.) it is said, that a lease which cannot take effect in interest, except by possibility, if it be not an estoppel, shall be void; as if tenant in fee leases by parol to A. for nine years, and the same day to B. for nine years, the lease to B. shall be void. For this he cites Plowd. 432; and though this statement be only part of the language of the apprentice who argued the case of *Smith* v. *Stapleton*, Chief Baron *Comyns*, by introducing it in this general way, must be considered as adopting it, in some degree at least, as authority in what is said by *Gawdy*, as referred to in Cro. Eliz. 160; there is afterwards added *Smith* v. *Stapleton*, Plowd. 426, though it is not clear whether this be his language or that of the reporter.

This same doctrine, as far as regards a second parol lease for years after a former lease for years, appears to have been treated as clear law in various books, though the effect of such a lease made after a prior lease for life has been the subject for discussion. See Bro. Abr. Lease, pl. 35, 48. *Plowden*, 521, note of the reporter, *Welchden* v. *Elkington*, Plowd. 521; *Plowden*'s Quæries, 122 and 161; Sir *Hugh Cholmondeley*'s case, Moore, 344, in the argument of *Cook*, attorney-general. So in *Wall* v. *Maydewell*, *Hutton*, 105, "If a man make a lease for twenty-one years, and after makes a lease for twenty-one years by parol, that is merely void; but if the second lease had been by deed, and he had procured the former lessee to attorn, he shall have the reversion." *Edward* v. *Staler*, Hardr. 345, *arguendo*. So *Sheppard*'s Touchst. 275 b.—"If the second lease be for the same or a less time, as if the first lease be for twenty years, and the second lease be for twenty or for ten years, to begin at the same time, these second leases are for the most part void;" but if the second lease be by fine, deed, indented or poll, it may pass the reversion, with attornment, where attornment is necessary; and without, if necessary. But if the second lease be by word of mouth, it is otherwise." And if the second lease be by fine or deed indented, then it may work by way of estoppel, both against the lessor and the lessee; so that if the first lease happen by any means, as by surrender or otherwise, to determine before it be run out, then the second lessee shall have it.

Upon these authorities, therefore, we feel ourselves obliged to hold, that the lease to the plaintiff was utterly void, so far as regarded the eight acres demised to *Charlton*.

If that be so, we are unable to distinguish the case in principle from that of *Gardiner* v. *Williamson*, 2 Barn. & Adol. 336, where the tithes of a parish, together with a messuage used as a homestead for collecting the tithes, having been demised, by a parol, at a rent of 200*l*. per annum, and a distress made for arrears, the Court of King's Bench held, that an action of trespass would lie, because the demise of the tithes, being by parol, was void. There was no valid demise, it was said, of the whole subject-matter, nor any distinct rent

reserved for that part of it upon which there might have been a legal distress. That case was the stronger, because it was contended that the whole rent must be taken to be issuable out of the corporeal hereditament, upon which alone a distress could be made. And accordingly, in a case of a lease by indenture, *Dyer* is reported to have held, (*Moore*, 50,) that if lands at common law, and copyhold lands, are leased by indenture rendering rent, all the rent is issuing out of the lands at common law, for the lessor had no power to make a lease of copyhold, wherefore as to this the lease is utterly void; but it is added, that, if a man lets lands, parcel of which he is seised of by disseisin, then the rent is issuing out of all the land, and by the entry of the disseisee the rent shall be apportioned, because the lease of this was not void, but voidable.

In this last case the tenant took an interest, and enjoyed all the lands demised till the time of his being evicted from a parcel thereof by the disseisee, and was therefore liable, in respect of such interest and enjoyment, to a portion of the rent.

In the case before the Court, which is not the case of a demise by indenture, the rent is reserved in respect of all the lands professed to be demised, and to be issuing out of the whole and every part thereof; and as the plaintiff, as to a portion of the land comprised in the demise, (which might be great or small, as far as the principle is concerned,) has taken no interest, and had no enjoyment, and is not bound by any estoppel, we are of opinion that the distress made by the defendant is not justifiable, either in respect to the whole rent reserved, or any portion of it.

It may further be observed, that, even supposing the plaintiff to have taken an *interesse termini* in the eight acres, capable of being executed by entry in case the demise to *Charlton* should happen to be forfeited or surrendered; yet, as that demise to *Charlton* was in force at the commencement of the plaintiff's tenancy, and continued during the whole period in respect of which the distress has been made, no demise of those eight acres to the plaintiff ever took effect, and, consequently, no right to any rent in respect of those eight acres has ever come into existence. And we are not aware of any case where an entire rent reserved has been held to be apportionable, in which the tenant has not been, at some period, subject to the entire rent, by virtue of the demise. Here the right of apportionment is not founded upon any eviction or other matter occurring subsequently to the demise, but upon an original defect in the demise itself, by which the entire rent was reserved. In this respect it is strictly analogous to *Gardiner* v. *Williamson*.

In the case of *Tomlinson* v. *Day*, 5 Moore, 658, which has been referred to, the landlord did not claim an apportioned part of an entire rent, either by avowry for a distress, or by action for the rent. It was an action for use and occupation, in which he was allowed to make use of an agreement for a lease (according to the express provision of the statute 11 Geo. 9, c. 19, s. 14,) "as evidence of the quantum of damages to be recovered," and as the defendant had been interrupted in the full enjoyment of what he had agreed for, the plaintiff was held "entitled to recover a reasonable compensation for the property enjoyed by the defendant as an equivalent for rent." The interruption to the defendant's right of exclusive sporting was, indeed, compared by Lord C. J. *Dallas* and Mr. Justice *Richardson* to an eviction; but if it was an eviction, it was clearly an eviction by title paramount. The agreement for exclusive sporting was not void on account of the landlord having made a prior agree-

ment to let it to some other person; but it was defeated because other persons interfered who had a right superior to that of the landlord. Supposing the circumstances, therefore, to amount to an eviction, it would be a case of apportionment, according to the acknowledged rule, and would not assist the argument in favour of the defendant.

Upon the whole, therefore, we are of opinion, that the judgment of the Court of Exchequer ought to be reversed.

Judgment reversed.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

IN

Michaelmas Term, 1836.

FLEMING *v.* HECTOR, Esq. M.P.
ADAMS and MORRIS *v.* RIPPON, Esq. M.P.
ADAMS and MORRIS *v.* O'BRIEN, Esq. M.P.

Where, by the rules of a club, it appeared to be the intention of the parties that all dealings should be for ready money, and a fund was provided for the committee, whose duty was to "*manage the affairs of the club*,"—*held*, that the members were not personally liable for any contracts on credit entered into by the committee.

THESE actions were brought for goods supplied and work done for the *Westminster* Reform Club, of which the defendants were members. Certain rules were framed for regulating the club, of which the following only are material to this case.

6. The entrance fee to be ten guineas, and the annual subscription five guineas.

8. If the annual subscription be not paid within two months from the 14th of *April*, the defaulter to cease to be a member of the club.

10. Appoints trustees for the club.

11. A committee of thirty members, chosen by vote at a general meeting of the club, to manage the affairs of the club.

22. Two general meetings of the club to be held each year, at which a full statement of the affairs of the club to be presented, signed by the chairman of the committee and the secretary; and such statement to be exhibited in the coffee-room for examination seven days previous to the meeting.

28. All members to discharge their club-bills from day to day, the steward being positively ordered not to open an account with any members, and being authorized, in case of neglect to pay on demand, to refuse to supply such person with any thing more.

The club was established in *April*, 1834, and dissolved in *February*, 1836. The rules from which the above are extracted, were the first printed regulations for the management of the club, though resolutions for that purpose had been previously passed by the committee. The committee took a furnished house, for the use of the club, at a rent of 1000 guineas per annum; and on the dissolution of the club every member was called upon to pay eleven guineas in discharge of the general liabilities. The present defendants refused to pay that sum.

The first action was brought to recover the price of wine supplied to the club during the whole period of its existence. The defendant *Hector*, who became a member in 1835, paid his entrance fees and subscription, and continued to frequent the club to the time of its dissolution in 1836: it appeared that he was in the habit of asking for "*Fleming*'s wine." Sufficient had been paid by the committee to the plaintiff, since the defendant became a member of the club, to pay for all wine supplied during the time of his being a member; but no appropriation was made of the monies at the time of payment, and the plaintiff therefore claimed to apply them in liquidation of the earlier items of his demand.

At the trial, before Lord *Abinger*, C. B., at the *Surrey* assizes, upon proof of these facts, it was contended that the defendant was not liable as a mere member of the club, the plaintiff not having contracted with, or given credit to him personally, and that, even if legally liable, the damages should be nominal only, as enough had been paid to cover that part of the plaintiff's demand which accrued while the defendant was a member of the club. A verdict was found for the plaintiff, under the direction of the learned judge, with leave to the defendant to move to enter a nonsuit.

Thesiger moved accordingly; *Andrews*, Serjt., Sir *W. Follett*, and *Montagu Chambers*, shewed cause; and *Thesiger* and *Platt* supported the rule.

The case of *Adams and another* v. *O'Brien* was an action brought under precisely similar circumstances, for the price of iron work done by the plaintiff for the club. The defendant was proved to have been frequently at the club during the whole period of its existence. It was tried before Lord *Abinger*, C. B., at the same assizes, and a similar verdict taken to that in the cause of *Fleming* v. *Hector*. *Platt* obtained a rule for a nonsuit, against which *Andrews*, Serjt., and *M. Chambers*, shewed cause.

The case of *Adams and another* v. *Rippon* was an action brought by the same plaintiffs against another member of the club. The facts differed somewhat from those in the preceding cases. Mr. *Rippon* had been named and elected a member of the committee, but had never acted as such; and, in fact, was never proved to have been in the club-house at all. He had consented to become a trustee, but it did not appear that he had ever actually become so. He did not pay his subscription, which became due in *April*, 1835, until more than two months after that period; and thereby, according to rule 8, ceased to be a member from *April*, 1835. Some evidence was given of a conversation between the defendant and the attorney for the plaintiffs, in which the defendant admitted his liability, but stated his determination to defend any action brought against him.

At the trial, before *Bolland*, B., in *Middlesex*, the jury found that the defendant ceased to be a member in *April*, 1835, and found a verdict for the plaintiff for 7*l.* 10*s.*, the value of the goods supplied by them previous to that period. A rule having been obtained by *Platt*, to enter a nonsuit pursuant to leave reserved for that purpose, *Erle* and *M. Chambers* shewed cause against, and *Platt* supported, the rule.

On behalf of the plaintiffs, it was contended that the defendants were liable, either as members of an association, which, though not formed for the purposes of trade, must nevertheless have all the legal incidents of a partnership; or considering the committee as the stewards of the club, each member would

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be bound by the acts of the committee, provided they did nothing to exceed the power with which the general rules and regulations invested them. These goods were clearly ordered for the use of the club, and were such as it was the duty of the committee to provide. *Delauney* v. *Strickland* (*a*). There was nothing to prevent the committee ordering these things on credit, if they had not the requisite funds in hand; they were deputed to manage the affairs of the club, and the accounts were open to the inspection of all the members; they must have an implied authority to purchase necessaries, even though the price may exceed the amount of the subscriptions. [*Parke*, B.—That depends upon their original powers. Every tradesman trusting an agent, can only sue those whom the agent was authorized to bind. No matter what the tradesman supposes; it must depend upon the actual authority given to the committee. A fund here is supplied for the committee, and ready money paid for every thing. How can you infer any further authority to bind members? If they were only agents to manage the affairs of the club, their contracts could have no such power. The question really is, whether the committee were agents for the club beyond the funds subscribed?] It could not be meant that the committee should in all cases incur a personal responsibility alone; they are rather like acting partners, or the managers of a joint stock company. The club, by approving the accounts at the half-yearly meetings, sanctioned the system of dealing on credit: and even a servant, if once permitted by his master to take up goods upon his credit, may bind his master, by any subsequent contract, though unauthorized. As to the third case, Mr. *Rippon* was actually a member of the committee, and must therefore be liable for goods supplied during the period for which he continued a member. *Kearsley* v. *Codd* (*b*), *Braithwaite* v. *Schofield* (*c*), *Raggett* v. *Musgrave* (*d*), *Raggett* v. *Bishop* (*e*), *Vice* v. *Lady Anson* (*f*), *Burls* v. *Smith* (*g*), *Dickenson* v. *Valpy* (*h*).

In support of the rules, it was argued that this was an association for a specific purpose, totally distinct, both in its objects and the liabilities it imposes on its members, from any ordinary partnership, or joint stock company, for trading purposes. *Browne* v. *Dayle* (*i*). There, no doubt, every member is liable, whether an active or a dormant partner. The cases cited are easily distinguishable on this ground. No case really resembling the present has ever been before the Court. There is no hardship on the tradesman: if he supplies on credit, he does so at his peril, as if dealing with an infant or married woman. These parties never held themselves out to him as liable; if they had, the case would be entirely different: but here the validity of any contract, as regards third parties, must depend solely on the authority the agent had to bind them by his acts. The defendants are entitled to have all monies paid, since their admission, applied in liquidation of debts contracted since that time. *Thompson* v. *Brown* (*k*). The subscriptions are paid to meet all the expenses of the current year; the committee have no power beyond that of applying the funds in hand. The members find that fund, and contract no liability beyond it. As to Mr. *Rippon*, if the plaintiffs seek to make use of

(*a*) 2 Stark. N. P. C. 416.
(*b*) 2 Car. & P. 408 (a).
(*c*) 9 B. & Cr. 401.
(*d*) 2 Car. & P. 566.
(*e*) 2 Car. & P. 343.
(*f*) 7 B. & Cr. 409.
(*g*) 7 Bing. 795.
(*h*) 10 B. & Cr.
(*i*) 3 Camp. 51 (a).
(*k*) 1 Moo. & Mal. 40.

the club regulations at all, they must be bound by all of them; and even though he was appointed a member of the committee, yet he never in any way interfered, or even attended the club.

Lord ABINGER, C. B.—I confess that, when these cases were tried before me, at *Guildford*, I strongly inclined to the opinion that the defendant was liable; but not supposing the matter to be so clear as not to deserve further consideration, I reserved the point in both cases, for the opinion of the Court, whether or no the plaintiffs should not be nonsuited. I had thought, but without much consideration, at the assizes, that institutions of this sort were of such a nature as to come under the same view as a partnership, and that the same rights might be extended to them; and that, where a body of gentlemen formed a club, and met together for one common object, whatsoever one did, in respect of the society, bound the others, if he had been requested and had consented to act for them. Several cases have been cited in the course of the argument, which do not apply, with the exception of one of them, to societies of this nature. Where persons are connected in profit and loss as partners, one partner has a right of property in the whole: he has a right in any ordinary transactions, unless the contrary be clearly shewn, to bind the partnership by a credit; he may accept a bill of exchange in the name of the firm although without *their authority*. It appears to me that this case must be decided on the ground on which the defendant put it, as a case between principal and agent. I apprehend that one of the members of this club, acting as a committee-man, could not bind another by accepting a bill of exchange; as if, on the purchase of a pipe of wine, the wine merchant were to draw a bill, I don't think a committee-man could accept it, so as to bind the members of the club; the understanding must be, that he is to pay, and not that he is an agent to accept a bill. The question therefore is, how far the committee who conducted the affairs of this club, as agents, were authorized to enter into the contracts, upon which the plaintiff seeks now to bind the members of the club at large. This depends on the constitution of the club, which is to be found in its own rules. With respect to two of the cases that were tried before me, at *Guildford*, on looking at their general rules, it certainly does strike me that it is impossible to interpret those rules, so as to give the committee the power of dealing on credit, even for the purposes of the club. It appears by the rules, that every member is to pay his subscription of ten guineas as entrance, before he can become a member, and a subscription of five guineas annually; so that by the provisions of the club, there is to be a fund in hand in order to bear the expenses. But then, again, every member who makes use of the club, who either eats or drinks there, or, in short, takes any sort of refreshment, is to pay ready money; that shews, again, that the club was not disposed, or did not intend, to have any transactions on credit, even with its own members; and it also shews, that care was taken to provide ready money to meet every expense, so that if a party or a member of the club were to order any particular thing that the club did not contain, he should pay for it instanter: and that it was not expected to be necessary for the committee to pledge the credit of the club, or their own. Under these circumstances, it does appear to me that the rules of the club, which are in writing, must be taken to form the constitution of the club, and that they are to be construed as matters of law. I do

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not see, therefore, what is to go to the jury. I do not see any thing in these rules, of which the jury are to be the judges. The words are, "*managing the affairs of the club.*" The question then is, what the affairs of the club are: they are to have in their hands a subscription, and they are to take care that every man pays it before he comes into the club, and also pays for every thing he has in the club. It therefore appears, that they intended to provide a sufficient fund in hand for the committee. I cannot infer that they intended the committee to act upon credit; and, unless you infer that they so intended, the plaintiffs have no case. It is very true that an order was made to pay Mr. *Fleming* so much on account; but when the case is viewed as the case of principal and agent, it is plain that something more was necessary, in order to fix the defendant, than the mere fact that the committee did not pay for the wine the moment it was supplied. It has been decided in several cases, that, where a party gives his agent money to obtain goods, which the agent obtains on credit, the principal is not liable. Yet here there is no account by which it has been proved that the committee had no more in hand to pay these demands. There has nothing been proved, which is required to be proved, in order to fix the principal. Suppose a man gives money to his coachman, to enable him to purchase hay and corn; if the coachman takes the money, and obtains the things either on his own or his master's credit, having the money in his pocket, his master is not bound; but if no money has been given, we must suppose it matter of necessity, and that he did buy on his master's credit. It appears, then, there is no evidence to shew, that at the time this wine was ordered, or the sum of 100*l.* paid, the committee had not funds in hand, or at least that Mr. *Fleming* had reason to suppose they had no funds in hand. If they had funds, it was immaterial to him whether they chose to pay immediately, or whether they rather chose to pay at stated periods. I therefore think, upon these grounds, that in both these cases there ought to be a nonsuit entered. With respect to the case tried before my brother *Bolland*, the only difficulty I see in that case, is the circumstance of Mr. *Rippon*'s saying that he might be liable, but that he would take the opinion of a court of law upon it; and Mr. Baron *Bolland*, knowing what had been held in these two cases that were tried at *Guildford*, stated he would not nonsuit the plaintiff, reserving the point for the defendant's counsel; and he then left to the jury this question,—"that supposing Mr. *Rippon* to be liable as a member of the club, then the question was, whether what he had said to the attorney's clerk made him a member beyond the period of the 14th of *June*, or whether it did not?" The jury found it did not, and that he was only a member up to the 14th day of *June*. The verdict of the jury was plainly founded upon this,—they thought him liable by being a member; and that he was liable in the smaller sum, being the debt incurred during that time. In point of fact, I think there was nothing to leave to the jury. Supposing I am right in the opinion I now form, the mere fact of his being a member was not sufficient evidence, because the conversation he had with the attorney's clerk, shews that he meant to dispute the liability in a court of law, and it cannot be said that he chooses, therefore, to make himself liable. I think, therefore, the case tried before my brother *Bolland* must follow the same course, and that judgment of nonsuit must be entered for the defendant. I think if the committee found they had not funds sufficient to carry the purposes on which it was founded into effect, namely, that it should be a ready

money affair, that they ought to have called a meeting and exposed the state of the club, and called upon the society to support them. It is very well known, in many of these recent establishments, that great expense has been incurred by building; and though the committee may have signed contracts for the building, yet it has always been done after a general meeting, and the sense of the whole club has been taken upon it; for you cannot suppose they would pledge their own credit to pay the builder's bill. So in these cases, if the subscriptions of the club were not sufficient to enable the committee to furnish the provisions if they were run out, it appears to me the committee ought to have called the club together, and asked for a further subscription, and have said, "It was not the intention of the club that we should make ourselves liable: certainly not. The intention of the club was to supply us with money beforehand." The committee ought to have done that. I am of opinion the defendants are not liable.

PARKE, B.—I am entirely of the same opinion, This is an action brought against the defendant on a contract, and the plaintiff must prove that the defendant, either himself or by his agent, has entered into that contract. It is quite clear that the plaintiff cannot recover against the defendant, unless he shews that the person making the contract was the agent of the defendant, and by him authorized to enter into the contract on his behalf; and the question is, in this case, whether there was sufficient evidence to go to the jury, to satisfy them that the person who actually ordered these goods was the authorized agent of the defendant in making the contract; and that really is the question in all cases of this kind, wherever the contract is not made personally by the defendant; in all cases of principal and agent, master and servant, and all other cases wherever the contract is not made personally by the defendant. In the case of *Fleming* against *Hector*, it is said there was sufficient evidence of one fact, namely, that he was a member of the club, and next, that the whole of the debts were contracted according to the constitution of the club, and that is proved by the written rules, which are the only evidence in the case; that is a question of law; and it is upon the construction of these rules that the liability of the defendant depends, so far as the case depends upon his being a member of the club. Both these cases, then, resolve themselves into questions of construction as to the meaning of the original rules of the club. It appears to be quite clear that the club was formed upon ready money principles, but it appears some contracts upon credit were entered into, which it is said the defendant has sanctioned. Of this there is no evidence at all, and it goes to the jury only on there having been such sanction on the part of the defendant. First, as to the construction of the rules of this club? Upon referring to these rules, it appears to be clear that the intention of this club was to provide a fund, to be administered by the committee, and many of these original rules bear particularly on that subject, and to provide the means of the society's carrying on their concerns. It is quite clear, from the provisions of the rules, that the society contemplated there should be a fund in hand, [*reads the section.*] Now I think it is impossible to come to any other conclusion on the true construction of these rules. All the committee was to do was to manage the fund; and if they chose to enter into contracts upon credit, when they had not sufficient funds, that is their own affair. There is no evidence in the case to warrant any conclusion that a society of this nature

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should have gone on dealing upon credit; all that the committee had to do was to pay ready money, or not to enter into any contract until they had money in hand; or if they chose to do so, it is mere matter of convenience, and they were not to suppose they were binding the members severally to pay, for they had the means of payment in their own hands. I have no doubt that is the true construction to be put upon the written documents. There is no evidence to show that the defendant had given authority to the committee to act as his agent, so as to render him liable on a contract of this kind; and it should be shewn affimatively by the plaintiff that the defendant had assented to their trading in a different manner. The only thing given in evidence was an order to pay a sum of money on account, on behalf of the members of the club, to Mr. *Fleming*, but the defendant is not proved to have sanctioned this; and even if he had, there is no proof that he knew at the time the committee were not in funds at the moment when they entered into the contract. The committee might at any time, according to their supposed mode of dealing, pursuant to their original right, have entered into a contract for the purchase of wine when they had money in the bankers' hands; but that is no proof they had not money in hand at the time of the alleged contract, and there is no proof that the defendant knew any thing of it; that rests on the committee not dealing in the way they ought to have dealt, but if that is to vary the authority given by the original rules, it ought to be shewn that the defendant knew it and sanctioned it,—but there is no proof whatever in the case of that. It seems to me, therefore, that the two cases of *Fleming* against *Hector*, and *Adams* versus *O'Brien*, stand on the same footing, and that a nonsuit ought to be entered. With regard to the other case, the question in fact comes to the same point. It appears that Mr. Rippon was named as a committee-man, but it does not appear that he ever acted as such, or sanctioned his being so named, and therefore that will fall to the ground. It appears he was a member before these regulations were published, but the only piece of evidence in the case that seemed at all to affect him was, that on which the Chief Baron has observed, and that was that when applied to by the clerk of the plaintiff's attorney, Mr. Rippon said he knew he was a member of the club, and as such liable; but I think that imports nothing more than that he knew he was a member of the club, as he had paid his subscription for the second year as well as the first; and then as to his liability, it is nothing more than the expression of his opinion, first, of his being a member of the club, and secondly, to his liability, in which he is wrong; indeed, in the very same breath, he says he will defend any action that may be brought against him, and have the question settled. It seems to me, therefore, that the case of *Adams* against *Rippon* differs in no respect from the others, and all the cases resolve themselves into questions of law as to the construction of these rules and regulations. I am opinion, for the reasons I have given, that the defendants are not liable.

ALDERSON, B.—I am of the same opinion. This question turns simply on the authority which the parties who have made the contract had to pledge the credit of the defendant to the plaintiffs, and in this case you may take it the committee have made the contract, and that they are by the rules of the society authorized to manage the affairs of the club. It may follow from that, that the defendant may have given authority to the committee to manage the affairs of

the club; then it is contended, on the part of the committee of management, that they have made the contract, and have had a right to pledge the personal credit of the defendant, and thereby to make him liable to the plaintiff on the present occasion. I think they have not, when I come to look at the rules of the club, which are to be the guide by which we are to act, and which is the only authority the committee had; and I do not find any thing to lead me to the conclusion that the authority of the committee extended to the right of pledging the personal credit of any of the members of the club; on the contrary, I find the members of the club carefully provided a fund, which was to be collected before they became members of the club; and having collected that fund, and provided it, the committee are to manage it; then what is it the committee are to manage? Why, the fund so provided; and to manage the club upon those terms. If that be so, then the committee are not authorized to pledge the credit of individual members of the club; and if they do deal on credit, it is their own affair, done on the faith of the money in their hands, which would enable them to pay their accounts. It seems to me there is no pretence for saying in this case, of *Adams* v. *Rippon*, (which is the only one I have heard, and which is the only one I shall enter into on the present occasion,) that the defendant is liable. With respect to the others, I agree in the general principles laid down by the rest of the Court, and I have no doubt the application of these rules is correct.

GURNEY, B., concurred.

ALDERSON, B., then added, that *Bolland*, B., had intimated his concurrence in the opinions about to be delivered, when he left the Court, in these cases.

Rule absolute for nonsuit in all three cases.

KNIGHT *v.* TURQUAND.

The official assignee in bankruptcy is not within the protection of the stat. 6 G. 4, c. 16, s. 44, which limits the time of bringing actions for any thing done in pursuance of the act to three months.

TRESPASS for breaking and entering the plaintiff's house, with a count for an *asportavit*. *Plea*—Not guilty.

At the trial, before Lord *Abinger*, C. B., at the last *Surrey* assizes, it appeared that the action was brought against the defendant as official assignee, in order to try the validity of the fiat issued against the defendant. Evidence was given of the defendant's interference in the sale of the plaintiff's effects; and his name appeared in the catalogue of sale as official assignee. The action was not commenced until more than three months after seizure of the goods. His lordship, being of opinion that the defendant came within the stat. 6 G. 4, c. 16, s. 44, which limits the time for bringing actions for acts done in pursuance of the statute, to three months, nonsuited the plaintiff.

Platt obtained a rule for a new trial, citing the cases of *Carruthers* v. *Payne* (*a*), *Edge* v. *Parker* (*b*), *Worth* v. *Budd* (*c*), *Monk* v. *Clark* (*d*), and contending that the new Bankrupt Act, 1 & 2 W. 4, c. 56, conferred no

(*a*) 5 Bing. 270.
(*b*) 8 B. & Cr. 697.
(*c*) 2 B. & Adol. 172.
(*d*) 10 Bing. 102. 2 Bing. N. C. 299.

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privilege on the official assignee in that respect, which was not previously enjoyed by the general assignees under the former statute.

Thesiger and *W. Clarkson* shewed cause.—The real question here is, whether an official assignee stands in a different situation from the general assignee, so as to bring an act done by him in his official capacity within the protection of the 44th section of the general Bankrupt Act. His duties and liabilities must be ascertained by reference to the act of parliament, by which the official assignee was first constituted, stat. 1 & 2 W. 4, c. 56. Section 23 directs that the official assignee *shall not interfere* as to the time and manner of the sale; but it does not say that he may not be present; and there was no evidence that he actually took any part in what was going forward: he attended merely as the responsible officer of the court, as the messenger might have done. Sec. 60 expressly describes him as an officer of the court, enacting that no judge, &c., official assignee, or other officer, shall sit in parliament. [Lord *Abinger*, C. B.—I see nothing to put the official assignee in a more favourable position than the creditors' assignees formerly stood. I certainly should not have nonsuited the plaintiff, had those cases been brought under my notice at the trial.] The official assignee derives his very existence from the act of parliament: he has here acted *bond fide*, and only done what the law imposed upon him as a duty. [*Parke*, B.—The assignee acts not in pursuance of the act, but under his right of property. The argument of Lord *Tenterden*, in *Worth* v. *Budd*, applies equally to an official assignee.] If the official assignee is not within the protection of this section, there is no period of limitation fixed for actions brought against him. [*Parke*, B.—Six years.] Then the official assignee would be liable to an action at the suit of the bankrupt, long after the dividend had been paid and all the affairs of the bankruptcy wound up.

Platt, in support of his rule, was stopped by the Court.

Lord ABINGER, C. B.—The cases cited in support of this rule are binding on the Court. I see no real distinction between the official and the general assignee; if the argument is good in the one case, it is in the other. I acted on the constant practice for assignees to plead the general issue. That power is given by the same section that limits the time for bringing an action. If the one privilege does not extend to these cases, the other cannot.

PARKE, B.—The official assignee does not, in my opinion, differ from the provisional assignee; except that, instead of being selected by the free choice of the creditors, the number of official assignees is limited. In both cases they act under their general right of property, and not under any special powers contained in either bankrupt act. The clause only applies to persons having a special authority under the act, and having no right of property over the subject-matter of the action.

ALDERSON, B., and GURNEY, B., concurred.

Rule absolute.

MARSTON *v.* HALLS.

PETERSDORFF moved to charge the defendant in execution.

A plaintiff cannot charge a defendant in execution after notice of the allowance of a writ of error, though sued out irregularly; he must first move to have it discharged.

Wordsworth opposed it, on the ground that notice had been given to the plaintiff of the allowance of a writ of error.

Petersdorff objected that the affidavit was insufficient, as not stating the grounds of error, or that bail in error had been put in.

Per Curiam.—You must move to discharge the writ of error. If it was irregularly sued out, it may be set aside; but until that is done, the plaintiff can take no further step.

Motion refused.

HAYTER *v.* ELEANOR MOAT, Administratrix of THOMAS MOAT, deceased.

Where a general verdict is taken, subject to a reference, and the arbitrator assesses the damages on each count separately, if one count be bad, the judgment will be arrested on that count only.

The omission to state a promise to pay in an *indebitatus* count, is not supplied, even after verdict, either by the statement at the beginning of the declaration of its being an action on promises, or by the conclusion that in consideration of the premises respectively before-mentioned, the defendant promised, &c.; the count in question not being included in such promise.

ASSUMPSIT. The two first counts of the declaration were on two bills of exchange accepted by the intestate; the third, fourth, fifth, and sixth counts, were respectively for goods sold and delivered, materials supplied, money paid, and an account stated; the promise being laid as made by the intestate in his lifetime; the breach, the non-payment by the intestate or defendant since his death. The seventh count stated, that after the death of the said intestate, to wit, &c., the defendant, as administratrix, was indebted to the plaintiff in 200*l.* for work and labour, care, diligence, and attention of the plaintiff, as an undertaker of funerals, done, performed, and bestowed, by the plaintiff and his servants, in and about the funeral of the said intestate, on the retainer and at the request of the defendant, as administratrix as aforesaid, and for divers hearses, coaches, horses, materials, and other necessary things, used and applied in and about the furnishing and conducting of the said funeral, by the plaintiff found and provided for the defendant as such administratrix as aforesaid, and at her request. The eighth count was for goods sold to the defendant, as administratrix: and the ninth, on an account stated with the defendant, as administratrix; concluding with the following breach,—that the defendant, as such administratrix as aforesaid, afterwards, to wit, &c., in consideration of the premises respectively last-mentioned, promised the plaintiff to pay him the said two several sums of money respectively last-mentioned, on request; yet she hath disregarded her promises, and hath not paid the same sums of money, or any of them, or any part thereof, &c.

Pleas—to the first and second counts, that intestate did not accept; to the third, fourth, fifth, and sixth, that intestate did not promise in manner and form, &c.; and, to the residue of the declaration, that defendant did not promise in manner and form. A plea of judgment recovered against the defendant, as administratrix, was subsequently pleaded *puis darein continuance*

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to all the counts in the declaration, except the seventh. To this plea the plaintiff entered a *nolle prosequi*, as to the eighth count; and as to the first, sixth, and ninth counts, prayed judgment of *assetts quando acciderint*.

At the trial, before Lord *Abinger*, at *Guildhall*, a verdict was taken for the plaintiff generally, subject to a reference to a barrister, who was to certify for what amount the verdict should stand, with leave for the defendant to take the opinion of the Court as to her liability for the expenses of the intestate's funeral. The action was brought to recover the expenses of the funeral, and also the balance of the plaintiff's bill for building a house for the intestate. The arbitrator assessed the damages separately on each count of the declaration.

Crowder obtained a rule to arrest the judgment on two grounds; first, that the seventh count contained no promise to pay; secondly, that there was a misjoinder.

Platt and *Russell Gurney* shewed cause.—The arbitrator having assessed the damages separately, the only question is as to arresting the judgment on the seventh count. The promise there is sufficiently stated. It is not necessary to state in pleading a mere conclusion of law. Here the law implies a promise to pay on receipt of the goods, and the plea admits the promise. [*Parke*, B.—A pleading in confession, which admits the promise, may be enough; here the party denied having made any such promise.] The putting *two* for *three* was a mere slip. The jury have, in fact, found that such a promise was made, and after verdict the Court will intend that such was the case. [*Alderson*, B.—The jury could only find a promise as in the declaration, and that would not help you, as no promise is there alleged. *Parke*, B.—Cannot you cure this, by entering no judgment on that count?] Enough appears here to imply a promise after verdict, without express words; each count is connected by the "whereas" with the original statement, that this is an action on promises; and the conclusion, that in consideration of the premises respectively last-mentioned, the defendant promised, &c. is large enough to include a promise applying to the seventh count. In *Swan* v. *Lewis* (*a*), the Court implied a *similiter* from the, &c. at the conclusion of the pleadings. So in *Hitchens* v. *Stevens* (*b*), the want of an allegation of attornment was held to be cured by verdict. [*Parke*, B.—What is there in this count which shews you must have proved a promise to pay on request? The goods might have been sold on six months' credit. *Alderson*, B.—You say nothing of the *solvendum in præsenti*.] The jury found that. [*Parke*, B.—The difficulty is the payment on request.]

Crowder, contrà.—The joinder of the seventh and ninth counts is clearly bad. The last count might be joined with the first six; being for monies due in the lifetime of the intestate; but the seventh is for a debt contracted by the defendant personally, since the death of the intestate; it is a mere personal contract. *Rogers* v. *Price* (*c*). [*Parke*, B.—May not this be remedied by entering a *nolle prosequi* on the seventh count?] The verdict is general.

(*a*) 3 Dowl. P. C. 700.
(*b*) Sir T. Raymond, 487.
(*c*) 3 You. & Jer. 28.

[*Parke*, B.—Every thing the arbitrator has found, must be taken to have been found by the jury.] It is too late now to enter a *nolle prosequi* after a general verdict.

Lord ABINGER, C. B.—When the verdict is general, one bad count spoils the whole declaration; but where the damages are assessed separately, the defect may be cured. Here, although the verdict was originally taken for the plaintiff generally, yet the arbitrator having assessed the damages separately on each count, we can see how much is awarded for the good counts, and how much for the bad one.

PARKE, B.—The arbitrator's certificate is in this case a part of the record; and it is as if the damages had originally been assessed separately on each count.

Judgment arrested on the seventh count:
On the others, judgment for the plaintiff.

TRIBE *v.* WINGFIELD.

The under-sheriff is justified in not allowing any person to practise before him as an advocate, except a barrister or attorney.

ERLE moved for a new trial in this case, which was tried before the under-sheriff of *Warwickshire*, on the ground that he had refused to allow a person named *Edmonds* to conduct the defendant's cause, in consequence of which the case was undefended. It appeared that *Edmonds* was an attorney's clerk, who had been allowed on previous occasions to practise as an advocate; but the under-sheriff had made a rule, that no one should be heard before him as an advocate, who was not a barrister or attorney. The affidavit stated, that the defendant was not aware that any change had been in practice adopted.

Lord ABINGER, C. B.—I think the rule laid down by the under-sheriff is the correct one. No one should be heard besides counsel and attornies, except the parties themselves conduct their own cause. As, however, this person has been allowed to practise on former occasions, we think this rule should be made absolute on payment of costs.

Rule absolute.

OSMAR *v.* RICHIES.

Affidavits to move for new trial must be sworn within first four days of term.

CROWDER moved for a new trial, on affidavits which appeared to have been sworn after the fourth day of term.

Per Curiam.—No affidavit can be used in moving for a new trial, unless sworn within the first four days of term.

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TURQUAND, Assignee of WILLIAM KNIGHT, *v.* JOHN KNIGHT.

The privilege of confidential communications extends to all knowledge acquired by an attorney when acting in that capacity. An attorney employed by a bankrupt to raise money for him, will not be allowed to state whether a certain document was at that time in the bankrupt's possession.

TROVER for the lease of a public-house, granted by one *Calvert* to the bankrupt, *William Knight*. *Pleas*—first, not guilty; secondly, denial of property in plaintiff; thirdly, that *William Knight*, before he became bankrupt, to wit, on the 28th of *September*, deposited the said lease with the defendant, as security for 850*l*. lent by the defendant to the bankrupt. *Replication* to the third plea, *de injurid*.

At the trial, before Lord *Abinger*, at *Guildhall*, it appeared that the fiat issued in *December*, 1835, within two months after the act of bankruptcy. In order to shew that the lease had been deposited with the defendant subsequently to the act of bankruptcy, the plaintiff called a person who had been employed during the month of *November* as the bankrupt's attorney, in endeavouring to procure him a loan of money. On his being asked whether the lease in question was at that time in the bankrupt's possession, it was objected, on the part of the defendant, that whatever knowledge he had upon that point, could only have been acquired by him in his professional capacity, and was therefore privileged. The learned judge rejected the evidence, and the jury found for the defendant.

Sir *F. Pollock* moved for a new trial, on the ground that the evidence had been improperly rejected; contending that the employment of an attorney to raise money, was not of that nature as to render what took place privileged from disclosure. The witness was acting not as an attorney, but as a scrivener. [Lord *Abinger*, C. B.—The Court inclines against you, but we will look into the cases. *Parke*, B. referred to *Wheatley* v. *Williams* (*a*), *Cholmondeley* v. *Clinton* (*b*), and Lord *Brougham*'s judgment in *Greenough* v. *Gaskell* (*c*).]

Cur. adv. vult.

On a subsequent day, Lord *Abinger*, C. B. said—We have examined the decisions upon this subject, and are of opinion that the weight of authority is decidedly against the admissibility of this evidence. This witness was undoubtedly acting as the bankrupt's attorney; and even had he been a scrivener only, it is by no means clear that he could have been compelled to disclose what he had learnt in that capacity. *Harvey* v. *Clayton* (*d*).

PARKE, B.—The privilege of attornies, in this respect, is co-extensive with their liability to the Court's summary jurisdiction. In *Ex parte Aitken* (*e*), it is thus laid down:—"Where an attorney is employed in a matter *wholly unconnected with his professional character*, the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character, as to afford a presumption that his character formed the ground of his employ-

(*a*) 1 M. & Wels. 533. S. C. *ante*, *p.* 140.
(*b*) 19 Ves. 268.
(*c*) 1 M. & Keene, 98.
(*d*) 2 Swanstone, (n) 221.
(*e*) 4 B. & Ald. 49.

ment by the client, there the Court will exercise this jurisdiction. The knowledge in this case was clearly acquired by the witness, in consequence of his professional character, and is therefore privileged.

Rule refused.

WOODTHORP *v.* LAWES.

A notice of dishonour of a bill of exchange is sufficient, if given by a person in whose hands it is, although he does not state where the bill is, or on whose behalf he applies.

ASSUMPSIT. The declaration stated that on, &c., in consideration that the plaintiff, at the request of the defendant, would take a bill of exchange, accepted by one *Watson*, for 30*l.*, being the amount due to the plaintiff on his acceptance, without any indorsement from or by the defendant, he, the defendant, promised and guaranteed to the plaintiff the regular payment of the said bill when due: that the plaintiff did receive and take from the defendant, without any indorsement thereof, from or by him, a bill of exchange, drawn by one *Miller* upon, and accepted by, the said *Watson*, payable to the order of the said *Miller*, three months after the date thereof, for the said sum of 30*l.*, being the bill mentioned and referred to in the said promise and guarantee. It went on to aver presentment to the acceptor, non-payment by him, and notice to the defendant, assigning as a breach, non-payment by defendant, according to the terms of his guarantee.

The defendant pleaded, first, no presentment to the acceptor; secondly, no notice of dishonour to the defendant; thirdly, no notice of dishonour to the drawer, *Miller*; on all of which issue was joined.

At the trial, before *Bolland*, B., at *Guildhall*, the presentment to the acceptor, and dishonour of the bill by him, were proved, and the following letter, from the plaintiff's attorney to *Miller*, the drawer:—

"15, *Fish Street Hill.*

"Sir,—A bill, drawn by you upon, and accepted by Mr. *Joshua Watson*, for 30*l.*, due yesterday, is dishonoured and unpaid; and I am desired to give you notice thereof, and to request that the same may be immediately taken up. "I am Sir, &c.,

"H. D. RUSHBURY."

The following letter was also sent on the same day to the defendant:—

"15, *Fish Street Hill, August* 10th, 1836.

"Sir,—I beg to inform you, that a bill of exchange by *Joshua Watson*, for 30*l.*, and due yesterday, is returned dishonoured, and remains unpaid; and I am desired to give you notice thereof, and to request that you pay the same immediately. "I am yours, &c.

"H. D. RUSHBURY."

The bill was at that time in *Rushbury's* hands, indorsed in blank, for the purpose of being presented. The jury found for the plaintiff.

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Cresswell moved, pursuant to leave reserved to him at the trial, to enter a nonsuit, on the ground that the notice of dishonour was insufficient. The letter to *Miller* only states that the bill was not paid; it contains no demand of payment. It does not state for whom the party applied, who was the holder, of the bill, or that it was at his office. [*Parke*, B.—If the notice was good at all, it was given time enough. Did you take this objection at the trial?—if not, it is now too late.] In *Chapman* v. *Keene* (*a*), the Court held, that the holder of a bill might avail himself of a notice given *by any party to the bill;* but here *Rushbury* was not party to the bill; it was only deposited with him for a specific purpose. [Lord *Abinger*, C. B.—Then every notice in the usual way, that a bill is lying at a bank, is insufficient. *Parke*, B.—By necessary implication, the payment must be made to the party applying; the bill was indorsed in blank, and was in his hands when the letter was written and demand made.] The defendant is only liable on his guarantee; *Rushbury* could have no title to sue. [*Parke*, B.—Notice by any party to the bill is sufficient. *Rushbury* was the legal holder of the bill. If the bill was handed over to him to receive the money, he stands in the situation of a banker.

Lord ABINGER, C. B.—I see no ground for the application.

Rule refused.

(*a*) 2 Adol. & Ellis, 193.

GOODY *v.* GOLDSMITH.

In assumpsit, a defendant pleaded two special pleas to the whole declaration, except as to a certain sum, and as to that sum he pleaded a payment into court; the plaintiff took the money out of court, and replied admitting that he did not proceed for damages *ultra*. In his replication he adopted the form of a *nolle prosequi*;—*Held*, that the defendant was entitled to the costs of the special pleas.

KELLY obtained a rule to review the master's taxation. In assumpsit for money had and received, and on an account stated, the particulars of demand claiming 28*l.* 5*s.*, the defendant pleaded, first, non-assumpsit to the whole declaration, except as to 3*l.* 5*s.*; secondly, to the whole declaration, as to 3*l.* 5*s.*, a set-off; and thirdly, as to the said sum of 3*l.* 5*s.*, a payment into court. The plaintiff replied in the following form:—the plaintiff protesting that the defendant did promise in manner and form, as he, the plaintiff, has complained, as to the second plea, admits that at the commencement of this suit, he was indebted to the defendant in a sum of money equal to the damages by the plaintiff sustained, by reason of the non-performance by the defendant of the promise in the declaration mentioned, except so much thereof as relates to the sum of 3*l.* 5*s.*, in the first plea excepted, in manner and form as in the second plea of the defendant is alleged; against which sum of money so due and owing from the plaintiff to the defendant, he, the plaintiff, is ready and willing, and hereby agrees to set off the said damages, according to the form of the statute in that case made and provided; therefore, the plaintiff will not further prosecute his action against the defendant, except as to the said sum of 3*l.* 5*s.*, parcel, &c.; and as to the last plea of the said defendant, the plaintiff admits that in respect of the causes of action in the declaration mentioned, so far as the same relate to the sum of 3*l.* 5*s.*, parcel, &c., he has not sustained damages to a greater amount than the said

sum of 3*l.* 5*s.* in that plea mentioned to be brought into court, and which said sum, so brought into court, he, the plaintiff, accepts in full satisfaction for, and in discharge of, the said sum, parcel, &c. The master refused to allow the defendant the costs of the plea of set-off.

Ogle, in shewing cause, proposed to shew, that as the plaintiff could not compel the defendant to set off his claim, and as the plea of set-off went to part only of the plaintiff's claim, and as the real bar to the further maintenance of the suit was the plea of payment into court, the plaintiff was entitled to all the costs, as he accepted in satisfaction the amount paid into court; but without entering into that question, the Court held that the replication amounted to a *nolle prosequi* to the sum mentioned in the plea of set-off, and therefore the defendant was entitled to the costs by the imperative terms of the statute (*a*).

Rule absolute.

(*a*) 3 & 4 W. 4, c. 42, s. xxxiii.

[See *Sharman* v. *Stevenson*, *ante* 74, that a plea of payment into court in this form would be bad on special demurrer. It would appear from the observations of the Court, in *Coates* v. *Stevens*, *ante* 75, that the defendant would be entitled to the costs of any pleas pleaded to a part of the declaration only, shewing that as to that part the plaintiff ought never to have sued the defendant, though the payment of a sum of money be pleaded as to the residue of the cause of action. Qu., what difference it makes that the plaintiff is obliged to bring his action for the whole sum, being unable to compel the defendant to take credit for the amount of a cross-demand.]

VERNON *v.* SHIPTON.

TROVER for 100 boxes of tin plates. *Pleas*—first, not guilty; secondly, that the plaintiff was not at the said time, when, &c., nor, &c., possessed of the said goods and chattels.

Goods were consigned by the plaintiff to the defendant, who was a wharfinger; by the direction of the consignee, and with the assent of the plaintiff, the goods were delivered to a third person:—*Held*, that such delivery was a good defence, and admissible under a plea denying the plaintiff's possession of the goods.

Held, also, that the plaintiff was entitled to a verdict on the plea of not guilty, such a delivery amounting to a conversion in fact, and the plea of not guilty admitting the plaintiff's possession.

At the trial, before *Patteson*, J., at the last assizes for the county of *Stafford*, it was in evidence that the plaintiff, in pursuance of a contract to send 1500 boxes of tin plates to a Mr. *Sanders*, forwarded the boxes in question by the boats of the defendant, who was a canal carrier. The boxes were conveyed to the defendant's wharf at *Liverpool;* but, by agreement between the plaintiff and *Sanders*, the former undertook to receive them back, the quality being complained of. *Sanders* accordingly gave an order to the defendant to restore them to the plaintiff. It was afterwards agreed, between the plaintiff and *Saunders*, that the boxes of tin plates should be sent to one *Hargreaves*, who had contracted to purchase 1500 boxes of tin plates of *Sanders*, and he sent an order to the defendant to deliver them to *Hargreaves*, and they were delivered to him accordingly. *Hargreaves* paid a part of the price to *Sanders;* but a dispute subsequently arising between the plaintiff and *Sanders*, the plaintiff required the defendant to deliver the boxes to him, pursuant to the first order given by *Sanders;* and upon their non-delivery brought the present action. It was contended, on behalf the defendant, first,

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that no conversion was proved; and secondly, that the second plea, denying the plaintiff's possession of the goods, was proved. On the part of the plaintiff, it was contended that the evidence of the transfer to *Hargreaves* was inadmissible under either of the pleas. The learned judge was of opinion that it supported the second plea, and, on the issue upon it, directed a verdict for the defendant: directing, also, the verdict to be entered for the the plaintiff on the issue on the first plea, but reserving leave to the defendant to move the Court to have the verdict entered for him on that issue; and to the plaintiff, to move to have the verdict on the second issue entered in his favour.

Maule now moved to enter the verdict for the plaintiff on the second issue.—The transfer to *Hargreaves* was inadmissible as evidence in support of a plea denying the possession. The defendant was the agent of the plaintiff, holding the goods for him; and the assent to the delivery of the goods to *Hargreaves* should have been pleaded as a license.

Per Curiam.—This is a case of constructive possession; and if the plea be taken in its proper sense, as denying the possessory right of the plaintiff, it is proved, for his constructive possession was at an end the moment the plaintiff assented to the transfer of them to a third person.

Rule refused.

R. V. Richards, in pursuance of the leave reserved, moved to have the verdict on the plea of not guilty entered for the defendant, on the ground that the possession of the plaintiff being at an end before the tranfer to *Hargreaves*, there was no conversion of the plaintiff's property.

PARKE, B.—The case must be considered as though it stood on the general issue alone; the plaintiff's property in the goods is admitted; and I have no doubt the delivery to a third party was a *primâ facie* conversion, requiring a special plea to avoid it. It has been decided (*a*), that a sale by one partner is *primâ facie* conversion of the partnership property, which can be avoided only by a plea stating his authority as a partner over the property. If a defendant is under any difficulty in knowing as to what goods an action is brought, he may obtain a particular.

ALDERSON, B.—*Stancliffe* v. *Hardwicke* was the case of an actual conversion; and the Court laid down the proposition, that a defence denying that it was wrongful must be specially pleaded. The question whether that is necessary where the evidence of a conversion consists in a demand and refusal, is still open, and is, in my opinion, one of great doubt. I think, as this is the case of an actual conversion, there is no ground for a rule.

Rule refused.

(*a*) *Stancliffe* v. *Hardwicke*, 2 C. M. & R. 1 S. C. *ante*, vol. i. p. 127.

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Withdrawing a juror at the trial does not put an end to a cause, unless it was clearly the intention of the parties at the time that it should have that effect.

Where all matters in difference were referred, *but no question of liability was to be raised*, the Court, upon affidavits shewing that the arbitrator could not have awarded the amount stated in his award to be due from defendant to plaintiff, except by rejecting a class of items, set aside the award, although nothing appeared on the face of it.

ASSUMPSIT against the defendant, who was an attorney, to recover compensation for his negligence in the conduct of certain business as the plaintiff's attorney, and also for money stated to have been received by him on the plaintiff's account. There were four special counts for the negligence, and a fifth for not returning certain deeds, with the usual money counts.

Pleas—1st, to the five special counts, the general issue; 2nd, to the four first counts, the Statute of Limitations; 3rd, to the fifth special count, a lien on the deeds; and, 4th, to the money counts, a set-off.

At the trial, before *Parke*, B., at the *Carmarthen* Summer Assizes for 1834, it appeared, that the Statute of Limitations was an answer to the counts for negligence; and at the suggestion of the learned judge, the matters of account between the parties were referred to an arbitrator; and a juror was withdrawn. The order of reference stated that the arbitrator was to settle all matters in difference between the parties touching the defendant's bills of costs, and all the plaintiff's demands on the defendant, with power to have the defendant's bills taxed, and to ascertain the balance between the parties, and to direct by whom and to whom and when the same should be paid; *but no question of liability was to be raised.* The arbitrator directed the defendant's bills to be taxed by the master. Before the taxation, the plaintiff discovered that the defendant was not admitted an attorney of any court at *Westminster* until after a considerable part of the business comprised in his bills had been done, he being an attorney and solicitor of the Court of *Great Sessions* in *Wales* only. The master refused to strike these charges out, but ascertained only the reasonableness of the items, and stated in the margin of the bill that, in his opinion, these charges should not be allowed. The arbitrator awarded, that the balance due from the defendant to the plaintiff was 170*l.* 12*s.* 6½*d.*, and directed the defendant to pay it within six weeks, and also, on demand, to give up all papers, deeds, &c. belonging to the plaintiff, then in his possession.

In a former term, *John Evans* obtained a rule to set aside the award, on affidavits shewing that the arbitrator could only have made his award for the sum above mentioned by rejecting all charges for business done previous to the defendant's admission to the superior courts, and had thereby exceeded his authority, it being expressly stated in the order of reference that no question of liability was to be raised. Against this rule, *E. V. Williams* shewed cause, contending, on the authority of *Symes* v. *Goodfellow* (*a*) and *Williams* v. *Jones* (*b*), that as nothing appears on the face of the award to impeach its validity, the Court could not look at any other document for that purpose.

The Court made the rule absolute, unless the plaintiff would go before the arbitrator again to ascertain the balance on the whole of the accounts.

This not being acceded to, *John Evans*, this term, obtained a rule to stay all further proceedings in this action, on the ground that under the facts of the case the withdrawal of a juror was a final settlement. *Moscati* v. *Lawson* (*c*).

(*a*) 2 Bing. N. C. 532.
(*b*) 5 Man. & Ry. 3.
(*c*) 1 Har. & Wol. 572.

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HARRIS v. THOMAS.

Maule and *E. V. Williams* shewed cause.—It cannot be said, that the withdrawal of a juror is necessarily a bar to further proceedings in an action; *Saunderson* v. *Mester*(*d*), *Everall* v. *Youells*(*e*); though it may be where the intention of the parties is clearly expressed, as in *Moscati* v. *Lawson*. Here it amounted to nothing more than a conditional agreement to put an end to the suit on the arbitrator making a good award. The award being now set aside, the plaintiff's former rights are revived. If the award is once set aside, it becomes a mere blank. How, then, can the plaintiff be bound by any of the terms of it? [*Parke*, B.—He may be bound as to continuing this action, though he may bring another.] There is nothing in point of law to prevent the plaintiff proceeding with the suit, and he has been guilty of no breach of good faith. The award was set aside by the defendant.

John Evans, contrà.—This was not a common order of reference, or there would have been no need to withdraw a juror. The express object of the whole arrangement was to save expense, aud put an end to the whole transaction. The reference was quite distinct from the cause, and was of all matters in difference. *Moscati* v. *Lawson* is directly in point. [*Parke*, B.—The award was intended to be distinct from the cause, and if set aside, the party may bring a new action. It certainly was not intended, at the trial, to bar the plaintiff's right to sue on his money demand.] The plaintiff may still proceed before the arbitrator on the terms of the original submission; he has deprived himself of the benefit of the award by refusing to go again before the arbitrator; he seeks to take advantage of an objection which he has discovered since the trial. The defendant demanded the exclusion of the question of liability as a condition for consenting to withdraw a juror. If the plaintiff be allowed to commence a fresh action, he ought not to be allowed to insist on this objection. Whatever hardship there may be, it is the plaintiff's own fault.

Lord ABINGER, C. B.—The mere withdrawing a juror certainly does not, in point of law, put an end to a cause. It may be done by consent of parties; as where the jury are discharged, from there appearing to be no chance of their agreeing on their verdict. The effect depends entirely upon what was the understanding of the parties at the time; as in the case of a *stet processus*. If this were a reference of the action, although other matters were also referred, if the award was set aside, it would be hard to prevent the plaintiff bringing another action. I thought, at first, it was so here; but in the order of reference no mention whatever is made of the action; and I do not see what other inference can be drawn from such an omission, except that the cause was at an end. The question referred to the arbitrator was merely to ascertain the amount due from either party; the question of liability was expressly excluded; and yet the plaintiff seeks to avail himself of an objection to his liability, of which he was not even aware when he consented to the reference. This certainly appears to me a breach of good faith on his part. The defendant set the award aside, with power to both parties to go again before the same arbitrator on the same terms as originally agreed upon. We will not allow the other party, by whose misconduct the award was made invalid, and who

(*d*) Ry. & Moo. 402. (*e*) 3 B. & Adol. 349.

refuses to accede to the terms imposed by the Court, to proceed with the original action. We say nothing of his right to bring a new action. If he does, it will be time enough to consider whether the case is governed by *Moscati* v. *Lawson*.

PARKE, B., ALDERSON, B., and GURNEY, B., concurred.

Rule absolute to stay all further proceedings; the parties being still at liberty to go before the arbitrator again on the original terms.

JONES *v.* PRITCHARD.

In an action for work and labour against a part-owner of a vessel, another part-owner is a competent witness to prove that the defendant has no share in the vessel, with a release. Query, is he without?

ASSUMPSIT for work and labour in repairing a ship, of which defendant was one of the part-owners. *Plea*—Non-assumpsit. At the trial, before the undersheriff of *Caernarvon*, *William Hughes*, the captain of the vessel, and a part-owner, was called by the defendant to prove that he, the defendant, was not a part-owner of the vessel. The undersheriff thought him an incompetent witness for that purpose, even if released, and the plaintiff obtained a verdict for 13*l*.

R. V. Richards obtained a rule nisi for a new trial on the ground that the witness ought either to be made competent by a release, or, as his only liability would be by reason of the verdict, his name might be indorsed on the record under the stat. 3 & 4 W. 4, c. 42, s. 26. He cited *Goodacre* v. *Breame* (*a*), *Young* v. *Bairner* (*b*), *Simons* v. *Smith* (*c*), and *Wilson* v. *Hirst* (*d*).

J. Jervis shewed cause.—The witness was clearly incompetent without a release; and in *Cheyne* v. *Koops* (*e*), Lord *Alvanley* said, "The partners are all bound in equity to contribute; and though, if an action at law was brought against the witness, he could plead the recovery in the present action, which would be a bar at law, yet if the defendant was dead or insolvent, the present plaintiff would have a right, by a bill in equity, to compel all the partners to contribute, and the witness would, of course, be subject to his share." In *Simons* v. *Smith* (*c*), Lord *Tenterden* was of the same opinion; and Lord *Kenyon*, in *Young* v. *Bairner* (*b*), held, that a partner could not, by a release, make his co-partner competent. [Lord *Abinger*, C. B.—I cannot think a party liable in equity after a release at law. *Parke*, B.—What interest can the witness have when the defendant has released him? If the defendant has to pay, he cannot call upon the witness to contribute; the defendant, by releasing, takes the debt upon himself.] Would his assignees be bound in case of bankruptcy? [*Parke*, B.—Certainly.] In *Wilson* v. *Hirst* (*d*), there were mutual releases. No demand was made to have the witness's name

(*a*) Peake N. P. C. 174.
(*b*) 1 Esp. 103.
(*c*) Ry. & M. 29.
(*d*) 4 B. & Adol. 760.
(*e*) 4 Esp. 112.

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JONES v. PRITCHARD.

indorsed on the record according to the provisions of the stat. 3 & 4 W. 4, c. 42, s. 26.

R. V. Richards.—*Hughes* was a good witness, even without a release. He came to prove himself solely liable, which a party may always do. *Jennings* v. *Griffiths* (*i*), *Moody* v. *King* (*k*). He came to prove that the contract was made with him alone, and that the plaintiff looked to him alone for payment. It would have been of no use to call *Hughes*, unless he could prove that he alone was liable, as there was no plea in abatement. At all events, *Wilson* v. *Hirst* (*l*) is decisive for the defendant.

PARKE, B.—It is difficult to see what liability the party can be under after the release.

The rest of the Court concurred. Rule absolute.

(*i*) Ry. & Moo. 42.
(*k*) 2 B. & Cr. 558.
(*l*) 4 B. & Adol. 760.

BROOKS *v.* ELKINS.

No particular words are necessary to make an instrument a promissory note. It is sufficient if a promise can be fairly implied. "I. O. U. 20*l.* to be paid on the 22nd," requires a stamp either as an agreement or a promissory note.

ASSUMPSIT for money due from defendant to plaintiff. *Pleas*—Payment and set-off.

At the trial, before Lord *Abinger*, at *Westminster*, the defendant offered to put in evidence the following document:—

"11th *Oct.*, 1831.

"I. O. U. 20*l.*, to be paid on the 22nd instant.

"W. BROOKS."

It was objected that this was not admissible in evidence unless stamped as a promissory-note. The learned judge admitted the evidence, giving the plaintiff leave to move to increase the damages, if the Court should be of opinion that the instrument required a stamp.

Maule obtained a rule accordingly; against which,

Erle shewed cause.—It is clear a common I. O. U. requires no stamp, though it shews that the parties stand in the relation of debtor and creditor. Then the mere addition of the words "to be paid on the 22nd," do not in any way alter the nature of the instrument; they do not amount to a promise. [*Parke*, B.—Suppose it was in this form—"I. O. U. 20*l.*, to be paid on demand;" surely that imports a promise.

Maule, contrà, was stopped by the Court.

Per Curiam.—No particular words are necessary to make an instrument a promissory-note; it is sufficient if a promise can fairly be inferred; but, at all events, this must be taken either as an agreement or a promissory note; and the amount being 20*l.* a stamp is requisite.

Rule absolute to increase.

GRIFFIN *v.* GRAY.

The Court will not set aside the proceedings because it is sworn that the party served is not the real defendant, but a stranger to the cause; he must wait until judgment is signed.

C. *JONES* obtained a rule to shew cause why the service of the writ in this case, and all subsequent proceedings, should not be set aside, on an affidavit, stating that the service was on *William Gray*, and not *Thomas Gray*, whose name was inserted in the writ; and that the party so served was an entire stranger to the cause. An application had been made to Mr. Justice *Patteson*, who refused to interfere, on the authority of *Doe* d. *Prosser* v. *King*, 2 Dowl. 580.

Petersdorff shewed cause.

Per Curiam.—At the trial the plaintiff must prove a demand against the defendant, to entitle himself to a verdict; if the right person has not been served, no harm will have been done to him; if judgment is signed, the party may then come and set it aside.

Rule discharged, with costs.

BARDEN *v.* MARY DE KEVERBERG.

A married woman, though the wife of an alien who is residing abroad, and is not shewn ever to have been in *England*, is not personally liable for goods sold to her; at all events unless she contracted for them as a feme sole. It is not sufficient that she did not state that she was married at the time she ordered the goods; she must be guilty of some misrepresentation, for the purpose of obtaining credit as a feme sole.

ASSUMPSIT for goods sold and delivered, and on account stated.

Pleas—1st, general issue; 2dly, that the defendant, before and at the time of making the promises in the declaration mentioned, was and still is the wife of one *Charles William Louis Joseph*, Baron *De Keverberg*. *Replication* to the latter plea, that the said *C. W. L. J.* Baron *De Keverberg* is an alien, born in foreign parts out of the allegiance of our lord the king, and within the allegiance of a foreign state, and never was nor is a subject of our lord the king by naturalisation, denisation, or otherwise; and that the said *C. W. L. J.* Baron *De K.* never was nor is within the Kingdon of *Great Britain* and *Ireland*, or any part thereof; and that the causes of action, and every part thereof, in the declaration mentioned, accrued to the plaintiff, and the said promise was made by the defendant, within the realm of *England*, that is to say, in the county of *Sussex*, while she, the defendant, lived in the said realm separate and apart from the said *C. W. L. J.* Baron *De K.*, as a single woman; and that the plaintiff did not give any credit to the said *C. W. L. J.* Baron *De K.*, but, on the contrary, contracted with the defendant as a feme sole, and on her own credit and responsibility, and that she, the defendant, made the promise in the declaration mentioned as such feme sole. Verification. *Rejoinder*, that the said *C. W. L. J.* Baron *De K.* is not an alien born in foreign parts, &c. &c., nor did the said causes of action accrue to the plaintiff, nor was the said promise made by the defendant, while she lived separate and apart from the said *C. W. L. J.* Baron *De K.*, as a single woman, nor did the plaintiff contract with the defendant as a feme sole and on her sole credit and responsibilty, nor did she make the promise in the declaration mentioned, in manner and form &c.; on which issue was joined.

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BARDEN v. DE KEVERBERG.

At the trial, before *Gaselee*, J., at the last *Sussex* assizes, it appeared that the defendant was residing at *Worthing*, where she kept a school, during the years 1833, 1834, and 1835, during which time the goods for which the present action was brought were supplied to her by the plaintiff, who is a linen-draper there. The delivery and value of the goods was proved. A variety of persons, with whom the defendant had had dealings, were called to prove that she had never stated herself to be a married woman, though in one case she was shewn to have stated that her husband was residing abroad. This evidence was objected to, on behalf of the defendant, but the objection was overruled by the learned judge, and the evidence admitted. Her husband, the Baron *De Keverberg*, was proved to be a foreigner residing in *Holland*, and it was not shewn that he had ever been in *England*. Affidavits of the defendant, made by her to procure her release from arrest in this cause were put in as evidence that her husband was an alien, being beyond the seas. The learned judge left it to the jury to say whether the defendant had obtained credit for these things as a single woman, telling them, that unless she made some false representation that she was a single woman in order to obtain credit, she would not be liable. The jury found for the plaintiff, damages 75*l*.

Platt obtained a rule nisi for a new trial, on the grounds, 1st, that the evidence was improperly admitted by the learned judge; and, 2dly, that the verdict was against evidence, it not appearing that the defendant had ever held herself out be a single woman.

Thesiger and *Channell* shewed cause.—It sufficiently appears, from all the evidence in the case, that the defendant was living and obtaining credit as a single woman. [*Parke, B.*—What evidence is there that she contracted with the plaintiff or represented herself to him as a feme sole? Your replication states that she contracted with the plaintiff as a feme sole. Even supposing the facts proved made her capable of contracting in that capacity, what evidence have you to support your averment that she did so? This evidence would rather prove that she dealt as a married woman. The burthen of proof is upon you.] Every married woman deals *primâ facie* as a feme sole, and is liable as such, though the liability may cease on proof of her coverture. [*Alderson*, B.—What she does is ambiguous; but how can that sustain your affirmative issue?] Unless she stated herself to be a married woman, the law implies her to contract as a feme sole. [Lord *Abinger*, C. B.—The law only says that a married woman, if her husband is resident abroad, may make herself liable by misrepresenting. *Parke*, B.—I have a strong opinion that the real principle is, that a feme covert may contract where the husband is *civiliter mortuus* (*a*). To make out this replication, you must prove both that her husband was residing abroad and that plaintiff believed her to be a feme sole. She is not liable simply because her husband is abroad.] In *Kay* v. *Duchess of Pienne* (*b*), Lord *Ellenborough* said, "If the husband has never been in this kingdom, the wife of an alien, I think, may be sued as a feme sole; that is the *Duchess of Mazarine's case*." If that be law, the plaintiff here would be entitled to recover, even were the averment of contracting struck out of the replication.

(*a*) Roper, Husb. & Wife, vol. 2, 121. (*b*) 3 Campb. 123.

[*Parke*, B.—There appears to be some misapprehension as to Lord *Ellenborough's* judgment. The case to which he alludes is that of an *alien enemy*, who is in the same situation as one *civiliter mortuus*.] The issue really amounts to this only. Did the plaintiff give credit to the defendant solely, or did he in any way look to her husband for payment. [*Parke*, B.—To be entitled to a verdict on this record, you must prove that the defendant made the promise as a feme sole.]

The defendant's counsel refusing to agree to a *stet processus*, the Court made the rule for a new trial

Absolute, without costs.

CARDWELL *v.* LUCAS.

COVENANT. The declaration stated, that one *John Hodson*, before and at the time of the making the indenture thereinafter mentioned, was seised in his demesne as of fee of and in the tenements and premises thereinafter mentioned to have been demised: and being so seised, theretofore, to wit, on the 25th of *March*, 1825, by a certain indenture then, with the consent and approval of the said *John Hodson* then given, made between the said *John Hodson* of the one part, and the said defendant of the other part, (which said indenture, sealed with the seal of the defendant, the plaintiff now brought here into court), it was witnessed, that for the considerations therein mentioned, he the said *John Hodson* had demised, granted, leased, set, and to farm let, unto the said defendant, his executors, and administrators, all that messuage or tenement, &c., [here followed a description of the premises,] to have and to hold the same unto the said defendant, his executors, and administrators, as follows; that is to say, as to the meadow lands, which were the closes called, &c., from the 25th of *December* then last past; as to the pasture and arable lands, except the close called &c., which was to be used as an outlet in the last year of the term, from the 2nd of *February*, then last past; and as to the said close called, &c., and all the residue of the thereby demised premises, from the 12th of *May* then next, for and during the term of eleven years, from those respective days next ensuing, and fully to be complete and ended, yielding and paying therefore as therein mentioned. And the said defendant did for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said *John Hodson*, his heirs, and assigns, by those presents, amongst other things, that he the said defendant, his executors, and administrators, should and would, with his and their cattle, eat and consume upon the thereby demised premises, all the hay, fodder, and straw, wheat straw excepted, which should from time to time during the said term, arise therefrom, and should and would yearly and every year, and at the most proper and seasonable time or times in each year during the said term thereby granted, set, spread, and bestow in an husbandlike manner upon such part or parts of the before-mentioned meadow lands as should be most in need thereof, all the dung, compost, and manure which should thereafter arise or be made from such eating and

A lessee entering and holding under a lease not executed by his landlord, is not estopped from shewing such want of execution by the lessor.

To enable the assignee of a reversioner to sue on the covenants contained in a lease, he must be seised of the same reversion to which the covenants were originally annexed.

A. granted a lease for 11 years, under which defendant entered, but which lease was never executed by A. who died and devised the property to the plaintiff; the plaintiff, as assignee of the reversioner sued the defendant for breaches of covenants contained in the lease. *Held*, that he could not maintain such action.

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CARDWELL v. LUCAS.

consumption as aforesaid, or be otherwise made upon the said thereby devised premises, save and except the dung and manure which should arise or be made from such eating and consumption as aforesaid in the last year of the said thereby granted term, which last-mentioned dung and manure should be left in the usual or common middlingstead belonging to the said premises for the use and as the property of the said *J. Hodson*, his heirs, and assigns; and also save and except so much of the said dung and manure as should be sufficient for planting yearly any quantity of potatoes not exceeding one-fourth part of an acre; and further, that after the hedges, ditches, gates, stiles, plats, and fences of and belonging to the thereby demised premises, should have been put into good and tenantable repair and condition, by and at the expense of the said *J. Hodson*, his heirs, or assigns, he the said defendant, his executors, and administrators, should and would, from time to time and at all times afterwards during the then residue of the said term thereby granted, at his and their own expense, keep and continue the same in the like repair and condition, and so yield up the same at the term's end: as by the said indenture, reference being thereunto had, would more fully appear. By virtue of which said indenture, and by the permission and consent of the said *J. Hodson*, the said defendant afterwards, to wit, on the 25th of *March* 1825, entered into and upon all and singular the said premises so mentioned to have been demised, with the appurtenances, and became and was possessed thereof for the said term term therein mentioned; and the said *J. Hodson*, being so seised as aforesaid, he the said *J. Hodson* afterwards, to wit, on the 8th of *February*, A. D. 1828, duly made and published his last will and testament, &c. [It then stated a devise to trustees for a term of 1000 years, on certain trusts, and subject thereto to the devisor's widow, *Ellen*, for life, or until her second marriage; remainder to the plaintiff for life.] And the said *J. Hodson* afterwards, to wit, on the 8th of *February*, 1828, died so seised of the reversion of and in the said premises, with the appurtenances as aforesaid, without altering his said will as to his said devises of the said premises, with the appurtenances, whereupon and whereby the said *Ellen* then became and was seised in her demesne as of freehold, for the term of her natural life, of the reversion of and in the said premises, with the appurtenances, subject to the said term of 1000 years, the remainder thereof after the death or second marriage of the said *Ellen*, belonging to the plaintiff, in manner as in and by the said will devised and declared; and the said *Ellen* being so seised, the said term of and in the said premises with the appurtenances, afterwards, to wit, on the 1st of *February*, 1829, under and by virtue and in pursuance of the said last will and testament and the provisions thereof, ceased, determined, and became and was utterly void to all intents and purposes whatsoever, the said premises or any part thereof not having been sold, mortgaged, or disposed of, for the purposes aforesaid, or otherwise. And the said *Ellen* afterwards, to wit, on the day and year last aforesaid, died so seised without having intermarried a second time: whereupon and whereby the said plaintiff then became and was seised of the said reversion of and in the said premises with the appurtenances, in his demesne as of freehold, for the term of his natural life, under and by virtue of the said last will and testament. The declaration then averred several breaches of the covenants therein set forth, viz., for not consuming the hay upon the premises, for not spreading the manure on such of the land as most wanted it, and that although the fences were repaired by

Hodson, the defendant did not keep them in repair. The defendant, after craving oyer of the indenture, pleaded, That although well and true it is that the said indenture is his the defendant's deed, and that the said *John Hodson* did die as in the declaration is alleged, yet the defendant says, that the said indenture was not signed by the said *John Hodson*, or by any agent or agents of the said *John Hodson* thereunto lawfully authorized by writing; nor was any lease of the said premises (so by the said indenture witnessed to have been demised as above mentioned,) for the said term of eleven years in the declaration in that behalf mentioned put in writing, and signed by the said *John Hodson*, or any agent or agents of the said *John Hodson* thereunto lawfully authorized by writing. And this he is ready to verify, &c.

Replication—that before and at the time of the making, by the said *John Hodson*, of the demise in the said indenture witnessed to have been made as aforesaid, and at the time of such delivery of the possession of the premises mentioned in the declaration as herein-before mentioned, to wit, on the day and year aforesaid, he, the said *John Hodson*, had the possession of all and singular the said premises in the declaration mentioncd. And that being so thereof possessed, he, the said *John Hodson*, afterwards, to wit, on the day and year aforesaid, demised the same, and delivered the possession thereof to the said defendant, to hold the same as tenant thereof, according to the terms of the said indenture. And that he the said defendant then had, took, accepted, and received such possession of all and singular the said premises of and from him the said *John Hodson*, under and by virtue of such delivery and demise by the said *John Hodson*, to hold the same according to the terms of the said indenture; and became and was tenant thereof under and by virtue of the said demise, and delivering up possession as aforesaid, to hold the same premises according to the terms of the said indenture, and held and enjoyed the same accordingly as such tenant as aforesaid, for and during the whole of the said term mentioned in the said indenture continually, until the determination thereof. Concluding with a verification.

Demurrer, assigning the following causes.—First, there being no signed lease, the estate created by the demise mentioned in the replication was only an estate at will, which determined on the lessor's death. Second, that the plaintiff ought to have stated in the replication the estate which he means to say the defendant took by the said demise. Third, that the plaintiff ought to have stated how the demise was made. Fourth, that if the plaintiff means by his replication to say, that the estate for years witnessed by the indenture to have been created was so created, he ought to have denied the truth of the plea, by alleging that there was some lease properly signed, or to that effect. Fifth, that the replication is a departure from the declaration. Sixth, that if the replication is intended to raise an estoppel, the plaintiff ought to have so pleaded, and relied on the estoppel. But, lastly, that there is nothing in the record to estop the plaintiff from relying on the Statute of Frauds.

Joinder in demurrer.

Cresswell, in support of the demurrer.—There are two objections to this replication:—1st, that it does not shew such a reversion in the plaintiff as would enable him to sue on the covenants contained in the lease; and, 2dly, that it is a departure from the declaration. As to the first point, as *Hodson* never executed the lease, which is admitted by the plaintiff, no term for eleven

years could have been created—nothing beyond a tenancy from year to year. The reversion would be after the expiration of the first year, with a new tenancy and reversion each successive year; but the covenants would be collateral to all the succeeding reversions except the first. *Webb* v. *Russell*(*a*). Then, 2dly, the replication is no traverse of the plea. Even if the original lessor could have sued during his lifetime, yet, as the tenancy was originally at will, it would determine on his death.

Cowling, contrà.—The plea is bad. A party to an indenture may sue on it, though he has never executed it; *Clement* v. *Henley*(*b*); and in *Petrie* v. *Bury*(*c*) the converse has been recently held, that all who can sue on a deed must sue. In that case a declaration by one of three joint covenantees was held bad on demurrer, although it was averred that the other two had not executed the deed. In Bacon's Abr., title Leases, O., it is laid down, that if there be no incapacity in either party, the lessee is estopped by a lease executed by himself, though not executed by the lessor. An estoppel need not in all cases be mutual, but only when one party is under a disability, as infancy. So in *Paul* v. *Meek*(*d*) it was held, the defendant, having executed the counterpart, was estopped from objecting to the insufficiency of the stamp on the original instrument. [*Parke*, B.—In *Wilson* v. *Woolfryes*(*e*), four plaintiffs declared in covenant that they, by indenture, demised to the defendant, and made profert of the counterpart; the defendant pleaded *non est factum;* and it was held to be competent to the defendant, after proof of the execution of the counterpart, to produce the demising part, and to shew that only two of the lessors executed it. Does the plea here amount in substance to *non est factum?*] In the ordinary case of a bond, where there can be no mutuality, the obligor is estopped. If the defendant is estopped as against the original lessors, he is equally so as against the present plaintiffs claiming under him and having the same estate. In *Palmer* v. *Elkins* (*f*) it is laid down, "that privies in estate, as the feoffee, assignee, &c. shall be bound by and take advantage of estoppels." [*Parke*, B.—That case only decided that *nil habuit in tenementis* was a bad plea as against the assignee of the lessor; the difficulty here is as to the reversion being in the plaintiff.] The lessee here was liable under the covenant so long as he occupied. He has held and enjoyed under this demise as for a term of years, which distinguishes it from those cases where the consideration failed by reason of the lessees non-entry or subsequent eviction. Com. Dig. Covenant (F.) The defendant having enjoyed for the whole term under the provisions of the lease, may be taken to have held under the lease. In Bac. Abr. Leases, L. p. 839, it is said, "A parol lease was made *de anno in annum quamdiù ambabus partibus placuerit;* it was adjudged that this was but a lease for a year certain, and that every year after it was a springing interest arising upon the first contract and parcel of it; so that if the lessee had occupied eight or ten years or more, these years, by computation from the time past, made an entire lease for so many years; and if rent was in arrear for part of one of those years and part of another, the lessor might distrain and avow as for so much rent arrear upon one entire lease, and need not avow as for several rents due upon several leases, accounting each year a new lease. And this seems

(*a*) 3 T. R. 393.
(*b*) 2 Roll. Abr. 22, pl. 2.
(*c*) 3 B. & Cr 353.
(*d*) 2 You. & Jer 116.
(*e*) 6 M. & S. 341.
(*f*) 2 Lord Ray. 1550.

no way impeached by the Statute of Frauds and Perjuries, which enacts, 'that no parol lease for above three years shall be accounted to have any other force or effect than of a lease only at will;' but with this the statute has nothing to do, but only looks forward to parol leases for above three years to come." In *Rose* v. *Poulton* (*g*), *Patteson*, J. took the distinction as to the cases "where a lease was in contemplation, but, in consequence of the non-execution, the *relation of landlord and tenant never was created.*" There can be no question in this case as to that relation having subsisted. The doctrine of Comyn, Dig. Covenant F,, applies only to those cases where, *in consequence* of the lessor's not executing, the tenant has not entered; and nothing further has been done. In *Soprani* v. *Skirrow* (*h*), it did not appear that the lessor had executed the indenture, nor was it even averred that he had demised. It did not appear that any term was created, or that the lessee had ever entered. The position, as laid down in Comyn's, Covenant, F., applies only to dependent and implied covenants; if the estate from which they arise is void, they become void also; but it is otherwise in the case of a covenant to farm properly, as in the present case, which is independent of the demise, and on which no other person could sue but the plaintiff. *Waller* v. *Dean and Chapter of Norwich* (*i*).

Cresswell, in reply.—The authorities cited do not in any way touch the argument for the defendant. The real question is, is the plaintiff the reversioner? When defendant first entered, he was mere tenant at will. The reversion on that tenancy was in the lessor. He could not have two reversions; one expectant on the estate at will, and the other on the term of eleven years. To what reversion were the covenants annexed? They cannot be disannexed afterwards. No doubt if land be occupied from year to year for several years, the landlord may distrain for several years' arrears, and avow as on a demise for all that time; but that does not apply to the case of a prospective demise. [*Parke*, B.—The object there is to keep up the landlord's right to distrain under the stat. 8 Anne, c. 14, as otherwise he would lose it at the expiration of six months.] The argument for the defendant is that the plaintiff is not the reversioner. Even admittitting the estoppel, that does not make the plaintiff the reversioner. Suppose the tenant had given notice to quit, and left the property, at the termination of any one year, what reversion would the plaintiff have had? He could not have had a shifting reversion.

Cur. adv. vult.

Lord ABINGER, C. B., (after stating the pleadings.)—To entitle the plaintiff to recover in this action, he must be the assignee of the reversion to which the covenants upon which he sues are annexed. If the lease had been signed and sealed by the original lessor, the term for eleven years would have been duly created, and the covenants would have been annexed to the reversion expectant thereon, which reversion would in that case have duly passed to the present plaintiff, and he would be entitled to the judgment of the Court; but as the lessor did not execute the lease, the covenants in the lease are either void, as the lease itself on which they are founded was never carried into effect, according to the case of

(*g*) 2 B. & Adol. 822.
(*h*) Yelverton, 18.
(*i*) Owen, 136.

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Rose v. *Poulton* (*k*); or, if the covenants were independent of the lease, they would be annexed, not to the reversion vested in the present plaintiff, but to the reversion on the tenancy at will, which determined on the death of Mr. *Hodson*, the original lessor. No tenancy from year to year was created by the instrument of demise; and though such a relation may have subsisted afterwards, these covenants could not have attached to the reversion expectant thereon. The judgment of the Court, in any view of the case, must therefore be for the defendant.

Judgment for the defendant.

(*k*) 2 B. & Adol. 822.

OWEN *v.* WATERS.

A declaration on a bill of exchange payable four months after date need not aver that that period had elapsed before the commencement of the suit; if it state, "which period has now elapsed," that is sufficient.

ASSUMPSIT on a bill of exchange (by drawer against acceptor,) payable four months after date. The declaration was in the form prescribed by the rule of *Trinity* Term 1 W. 4. containing the words, *which period has now elapsed*, and was entitled 25th of *October*.

Demurrer, assigning for cause, that it did not sufficiently appear that the bill had become due before the commencement of the suit; but that, instead of stating "which period has *now* elapsed," it should have averred, "which period had elapsed *before the commencement of this suit*.

Chadwicke Jones, in support of the demurrer.—The suing out the writ is now the commencement of the suit. The four months may have expired before delivering of the declaration, though after the writ was sued out. In *Abbott* v. *Aslett* (*a*), the Court refused to set aside a demurrer on this ground as frivolous, and recommended the plaintiff to amend his declaration.

Addison, contrà.—That case is only an authority that this demurrer is not frivolous. This declaration is strictly in conformity with the rule, which was meant to apply to all the courts. In the Common Pleas, the declaration was never the commencement of the action—the writ was always so considered; and in the other courts also, when the proceedings were by original. Independently of these rules, the declaration is sufficient without this averment. Supposing the demurrer-book made up, the real dates would appear. [*Parke*, B.—The date of the bill does not appear on the face of the declaration. Is there any presumption in law that a bill is drawn when dated? In *Coxen* v. *Lyon* (*b*), *Thompson*, B., held the variance not to be fatal where the date of a bill appeared to be different from the day on which it was alleged to have been made.] *Primâ facie*, it must be taken that a bill bears date the day it is drawn. Bayley on Bills, 308, citing *Hague* v. *French* (*c*). *Hunt* v. *Massey* (*d*) is also an authority to this effect. It would therefore appear that the time had elapsed before the action was commenced, and it would be enough, if nothing

(*a*) 1 Mee. & W 209.
(*b*) 2 Camp. 307 (n.)
(*c*) 3 Bos. & Pul. 173.
(*d*) 5 B. & Adol. 902.

appeared to the contrary. *Lee* v. *Clarke*(*e*), *Pugh* v. *Robinson*(*f*). It is not necessary to aver expressly that the bill was due. [*Parke*, B.—The old form always stated the date of the instrument. I never drew a declaration without stating that the bill was due before action brought. We are now to take notice of the date of the writ. If we assume the date of the writ to be the date of the declaration, there is no difficulty. Lord *Abinger*, C. B.—It comes to this, whether it must appear with certainty that the cause of action had accrued before the writ was sued out, or whether it may be left *in ambiguo*.]

C. Jones in reply. *Cur. adv. vult.*

Lord ABINGER, C. B.—There was a case of *Owen* v. *Waters* argued in the course of this term before my brothers *Parke*, *Alderson*, *Gurney*, and myself. The case turned on two questions; first, whether the day on which the bill bore date was to be taken to be the day on which it was stated to have been made; and, secondly, whether it sufficiently appeared upon the face of the declaration that the bill was due before the time when the action was commenced. The Court have looked into the cases that were cited on the argument, and we think Mr. *Addison* was correct in his mode of stating the form of pleading; and, first of all, they will not sanction any proposition that the right of action should be shewn to have accrued at any time prior to its commencement, except it appears from the declaration itself. In other words, the Court does not look out of the declaration in order to see whether the action was commenced before the declaration was filed. To illustrate this, we have only to look to the form of pleading in respect of the Statute of Limitations. If you plead the Statute of Limitations, it always applies to the declaration; and the plaintiff replies, and shews the writ was sued out before. If it appears on the face of the declaration, that the action was commenced, and the first writ sued out before such right of action had accrued, that would be wrong; but you are not to intend that, to make a declaration bad. We also think, that though it may be true that you may offer any evidence to shew the truth where it is said that a bill is made to appear dated unfairly—to shew that it really was dated on a particular day, yet, so long as that remains without explanation, we may fairly suppose the bill bears date the day on which, in the declaration, it is stated to be made. Therefore, on both grounds, it appears to us that the declaration is good, and that the defendant has no ground of demurrer.

Judgment for the plaintiff.

(*e*) 2 East, 338. (*f*) 1 T. R. 116.

WELLS *v.* GILES.

ASSUMPSIT on a bill of exchange, with a count for goods sold and delivered. *Pleas*.—To first count, that the bill was not due at the time of commencing the action; and to second, Non-assumpsit.

Replication.—To first plea, that the bill had become due before, &c.

At the trial before *Bolland*, B., it appeared that the bill in question became

It is too early to issue a writ on the day on which a bill of exchange is due; it is sufficient in such a case to plead that the bill was not due at the time of commencing the suit.

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due, *October* 4th, and that the writ was issued at 4 o'clock in the afternoon of that day. The jury found for the defendant on the first count.

Hoggins, by permission of the learned judge, moved to enter a verdict for the plaintiff. The defendant should have pleaded that the bill became due on the 4th, and that he had the whole day to pay it in.

Per Cur.—The meaning of the plea is, that the plaintiff had no cause of action before he sued out his writ: when the writ was issued his right of action was not complete.

Rule refused.

M'CUNE *v.* SMITH.

In the King's Bench and Exchequer, it is discretionary with the master to allow the costs of passing the record: in the Common Pleas it may be passed immediately on issue joined.

KELLY obtained a rule for the master to review his taxation, he having refused to allow the costs of passing the record. It appeared that notice of trial had been given on the 4th, for the second sittings in Term, the 22nd. The record was passed on the 9th, or 10th, or 11th; a summons was taken out to stay proceedings on payment of debt and costs. It did not appear that the plaintiff had any intimation of what the defendant meant to do.

Barstow shewed cause in the first instance, and contended that it was in the discretion of the master, upon a review of all the facts of each particular case, whether the attorney was justified in incurring these costs. Unless this rule is laid down, a plaintiff will be entitled to pass his record immediately on issue being joined.

Kelly was heard in support of the rule.

Lord ABINGER, C. B.—We will speak to the judges of the other courts, as it is of importance that such a point of practice should be settled.

On a subsequent day, his lordship stated the rule to be, that in the King's Bench and Exchequer, it was discretionary with the master to allow these charges, but in the Common Pleas, the record might be passed immediately that the issue was joined.

Rule discharged.

MARSTOW *v.* HALES.

A writ of error acts as a supersedeas from the time that notice of its allowance is given; even though it be irregular in not stating the ground of error.

ON a motion to charge defendant in execution, *Wordsworth* objected that a writ of error had been sued out, and a notice of the allowance of it duly served.

Petersdorff, in support of his motion, contended, that a writ of error did not act as a supersedeas unless it complied with the rule of court, *Hilary* Term,

4 *W.* 4. No. 9, requiring the grounds of error to be stated, which did not appear to have been done in this case.

Per Cur.—The proper course for the plaintiff will be, to move to quash the writ of error; nothing can be done until that is set aside.

Remanded.

LEWIS *v.* JONES.

The Court, in granting an interpleader rule, where the judgment creditor did not appear, reserved to the claimant the right to try an issue with the sheriff as to his having been guilty of misconduct, but not to bring an action of trespass for the original seizure.

If the plaintiff gives the sheriff any special directions as to seizing property, he will be liable to an action at the suit of the real owner.

E. V. WILLIAMS, obtained an interpleader rule on behalf of the sheriff of *Carmarthen*, calling upon the execution creditor and claimant to come into court, and state their respective claims. It appeared that a *fi. fa.* was sent to the sheriff with the indorsement, levy, &c. "The defendant resides on or occupies the farm, lands, and premises of and in the parish of *Berthelay*, in the county of *Carmarthen*, the stock, crop, and effects whereof, the plaintiff insists to belong to the said defendant." The sheriff seized the growing crops in consequence. The execution creditor did not appear.

Chilton, for the claimant, contended that the sheriff was not entitled to the assistance of the court, as it did not appear that he had made sufficient inquiry as to the nature of the claims set up. *Bishop* v. *Hinkman* (*a*). And had moreover been guilty of great negligence and misconduct in conducting the seizure. That at all events the claimant ought not to be barred from suing the sheriff for any misconduct.

E. V. Williams—The court will bar both parties, as against the sheriff, by ordering the goods to be delivered over to the claimant. The execution creditor, by directing the sheriff to levy on certain goods, made him his agent. The claimant must therefore sue the execution creditor. [*Parke*, B. mentioned a case where the goods were ordered to be sold and the money paid into court, and it was held that both parties were bound by the form of the rule.]

Lord ABINGER, C. B.—If the execution creditor has given any improper directions, he ought to be liable for whatever mischief may result from them. If the sheriff has been guilty of any misconduct, he ought to be liable for that, but not in trespass for the original seizure.

Rule absolute.

The execution creditor to be barred as against the sheriff; the goods to be restored to the claimant; the claimant to be barred from any action of trespass against the sheriff, but to be allowed to try an issue against him if he pleases—whether he has sustained any damage in consequence of any misconduct of the sheriff in and about retaining the seizure—and also to be allowed to bring an action against the execution creditor for directing the sheriff to levy on the goods.

(*a*) 2 Dowl. 166.

Exchequer.

SHILLIBEER *v.* GLYN, Baronet, and others.

Declaration stated that plaintiff paid money to defendant in *London*, that he might cause it to be repaid to him at *Northampton* on a certain day; that defendant received the money, and in consideration of the premises promised to cause the money to be paid to the plaintiff at *Northampton*. *Held*, to disclose a sufficient consideration.

ASSUMPSIT.—The declaration stated that the defendants were co-partners in banking and exercised the trade of bankers in *London;* that the plaintiff was the owner of coaches, &c. running in and about *London* and other places, and in the habit of attending markets and fairs for the sale of horses; that on the 31st of *March*, 1834, the plaintiff, being about to proceed from *London* to a fair at *Northampton*, to be held on the 5th of *April*, paid into the defendant's banking-house in *London*, £650, in order that the defendant might cause that sum to be paid to the plaintiff or his order at *Northampton*, on the 5th of *April;* that the defendants received the said sum from the plaintiff, for the purpose that they might cause the said sum to be paid to the plaintiff or his order at *Northampton:* and thereupon, in consideration of the premises, the defendants promised the plaintiff that they would punctually cause the said sum to be paid to the plaintiff or his order at *Northampton*, on the 5th of *April*.

Breach—That although the plaintiff confiding, &c. did go to the fair at *Northampton*, for the purpose of purchasing horses, the defendants did not, though requested, pay or cause to be paid, the said money or any part thereof to the plaintiff or his order at *Northampton*, at the time so agreed upon, stating special damage in inability to buy horses, and expense in travelling and servants, and being obliged to buy inferior horses at higher prices.

General demurrer—The point stated in the margin that the declaration shewed no sufficient consideration for the alleged promise.

Manning, in support of demurrer.—The declaration here discloses no sufficient consideration. The defendants were gratuitous bailees, and therefore only liable for gross negligence. In *Doorman* v. *Jenkins* (*b*), where the bailees were gratuitous, the verdict for the plaintiff was held to be right, on the ground that the facts of the case amounted to gross negligence. *Coggs* v. *Bernard* (*c*), *Shells* v. *Blackbourne* (*d*), *Dartnall* v. *Howard* (*e*), *Whitehead* v. *Greethan* (*f*). The only objection to this rule is, where, from the character in which the party acts, any particular knowledge or care is necessarily implied. [Lord *Abinger*, C. B.—If the defendant received the money as voluntary bailee, he is bound to use ordinary care, and an express promise is here alleged.] The mere deposit could not be a sufficient consideration for the promise here stated, as it would include a loss by robbery of the mail. [Lord *Abinger*, C. B.—Is there no detriment to the plaintiff by leaving the money in the defendant's hands? The declaration in fact says, in consideration of plaintiff's depriving himself of his money, defendant promised to repay it to him at *Northampton*.] The money was left for the plaintiff's benefit. [*Parke*, B.—One delivers and the other receives for a specific purpose. In

(*b*) 2 Adol. & Ellis, 256. 4 Nev. & Man. 170.
(*c*) 2 Lord Raymond, 909.
(*d*) 1 H. Bl. 158.
(*e*) 4 B. & Cr. 345.
(*f*) M'Cl. & Y. 205.

consideration of the delivery by the plaintiff, the defendant promises: a request is only necessary where the consideration is executed.] The consideration is executed here, and must therefore be connected expressly with the subsequent promise. *Hayes* v. *Warren* (*g*), where the judgment was reversed in error because no request of the defendant was stated, the consideration being a past one. *West* v. *West* (*h*), *Oliverson* v. *Wood* (*i*), *Cottor* v. *Westcott* (*k*). [*Parke*, B.—If the words imply a promise to pay at all events, that is a sufficient contract. The case resolves itself into a question, what the words really mean. Did the defendant contemporaneously promise to pay at all events? if so, it is sufficient. If the promise was merely to forward, a subsequent promise would not be sufficient.] The plaintiffs should state as a consideration a contemporaneous positive promise. [Lord *Abinger*, C. B.—Does not this amount to an actual agreement between the parties?] This is no part of a banker's business. *Sims* v. *Bond* (*l*).

The Court suggested that the plaintiff had better amend by inserting that the money was deposited at the request of the defendant, which *Barstow* declined.

Barstow, in support of the declaration.—The consideration here stated is sufficient. The money is paid into the bank in order to be transmitted to *Northampton*, and is received for that express purpose. It is laid down in *Wheatley* v. *Lowe* (*m*), that if A. accepts money from B. to deliver it over to C., the acceptance of the money is a good consideration to charge him in assumpsit at the suit of B. upon a promise to pay the amount to C.; this case is recognised in *Jones on Bailments*, p. 51. [*Parke*, B.—Your argument is, that unless an express agreement to pay at all events could be proved, you ould not recover on the general issue.] Certainly.

Manning, in reply.—The only question is, whether the acceptance by the defendant of money *not* at his own request, is a sufficient consideration for a promise to pay *at all events*.

PARKE, B.—Upon the authority of the case of *Wheatley* v. *Lowe*, I am of opinion that this declaration may be sustained. Upon the plea of the general issue, the plaintiff must prove an express undertaking on the part of the defendant to guarantee payment at *Northampton*, or he cannot succeed. Should it appear upon the roll in *Wheatly* v. *Lowe*, that the consideration and promise are not correctly laid in the report, the defendant can move in arrest of judgment.

Leave to withdraw demurrer and plead, on payment of costs.

Some questions having arisen during the argument as to the form of action in *Doorman* v. *Jenkins;* it was found in one report to be stated to be an action on the case for negligence, and in the other to be an action of assumpsit.

(*g*) 2 Str. 933.
(*h*) 1 Roll. Abr. 11. 1 Vin. Abr. 279.
(*i*) 3 Lev. 366.
(*k*) 3 Buls. 187.
(*l*) 5 B. & Adol. 389.
(*m*) Cro. Jac. 667.

Exchequer.

HEALE *v.* CURTIS.

If issue be joined in the vacation after *Easter* Term, and no notice of trial given, it is too early to apply for judgment as in a case of a nonsuit in *Michaelmas* Term, where it does not appear that it is a country cause.

MELLOR shewed cause against a rule for judgment as in a case of a nonsuit.—This application is too early; issue was joined in the vacation after *Easter* Term, and no notice of trial has been given. *Wingrove* v. *Hodson* (*a*).

Thomas, contrà, cited *Williams* v. *Edwards* (*b*).

ABINGER, C. B.—That was a country cause which this is not shewn to be. This application is too early.

Rule discharged with costs.

(*a*) 2 Dowl. P. C. 379. (*b*) 1 Cr. M. & R. 583.

HOBBY and another *v.* PRITCHARD.

Where business is done by an attorney for two persons jointly, his bill cannot be referred to the master on the application and undertaking of one of them only.

Qu.—Whether an action pending on the bill makes any difference.

CHANDLESS obtained a rule to shew cause why a judge's order for referring the bill of the attorney for the plaintiffs in this action to the master for taxation should not be set aside, the order being made on the undertaking of *William Hobby* alone. *Finchett* v. *Horn* (*a*).

Addison shewed cause.—Where the retainer is joint, the Court or any judge may make the order for taxation on the application and undertaking of either of the parties. The stat. 2 G. 2. c. 22. s. 27, enacts that no attorney shall sue on his bill for fees, &c. until the expiration of one month after he shall have delivered to the party or parties to be charged therewith, a bill of such fees, &c., and that upon application of the party or parties chargeable by such bill, or *of any other person authorized in their behalf* unto the Lord Chancellor, or unto a judge or baron of any court in which the business shall have been transacted; and *upon the submission* of the said party or parties, *or such other person authorized as aforesaid*, to pay the whole sum that upon taxation of the said bill should appear to be due to the said attorney, &c.; it shall be lawful for any judge, &c. to refer such bill to be taxed by the proper officer, and upon the taxation of such bill *the party or parties* shall forthwith pay to the said attorney the whole sum so found to be due, &c. The language of the statute clearly makes a difference between the party paying and the party giving the undertaking; in the latter case an agent is sufficient. Here, *Hobby* acted as the agent of his co-plaintiff, which is sufficient to satisfy both the words and spirit of the statute. The retainer being joint, the liability is also joint. A payment on account by one of these plaintiffs would be sufficient to take the case out of the operation of the Statute of Limitations as to both. The plaintiff has no other mode of obtaining a taxation of his attorney's bill in the event of any collusion between such attorney and his co-plaintiff.

(*a*) 2 Camp. 277.

[Lord *Abinger*, C. B.—In that case, upon a special application, the Court might perhaps interfere on the ground of fraud, but nothing of the kind is shown to exist here. Can this at the utmost be any thing more than a partnership? and it is clear that a partner cannot even bind his co-partners by deed, much less make him liable to an attachment.] The Courts have a common law jurisdiction over attornies to order their bills to be taxed in their discretion. [*Parke*, B.—The common law jurisdiction of the courts in these matters is now somewhat exploded.] It certainly has been doubted in some recent cases. In *Nelson* v. *Postan* (*b*), this court held that a baron at chambers might in his discretion dispense with the undertaking to pay what should be found to be due. The same was held in *Wilson* v. *Gutteridge* (*c*), although the more recent case of *Dagley* v. *Kentish* (*d*), has thrown some doubt on these decisions. [*Parke*, B.—If an action were pending it might be different.]

Chandless, contrà, was stopped by the Court.

ALDERSON, B.—Can you persuade the Court to give the attorney less security than he has by the statute? The point is quite clear.

Rule absolute.

(*b*) 2 Cr. & J. 370. (*c*) 3 B. & Cr. 158. (*d*) 2 B. & Ad. 411.

DAWSON *v.* MACDONALD.

ASSUMPSIT.—Indorsee against acceptor of a bill of exchange. The defendant obtained an order for inspecting the bill upon an affidavit that he believed the acceptance to be a forgery; having accordingly inspected it, he obtained an order to plead, 1st, that he did not accept; 2dly, and 3dly, pleas denying the drawing and indorsing; and 4thly, that the bill was not duly stamped according to the provisions of statute 3 & 4 W. 4. c. 97, s. 17.

In an action on a bill of exchange, the sufficiency of the stamp is put in issue by a plea denying the acceptance, and the Court will not allow a distinct plea that the stamp is insufficient.

Humfrey obtained a rule to strike out the fourth plea, as the correctness of the stamp was put in issue by each of the previous pleas.

R. V. Richards shewed cause, and tried to distinguish this from cases under the general Stamp Act.

PARKE, B.—This is clearly a defence under *non accepit*. If the instrument is wrongly stamped it cannot be given in evidence.

Rule absolute.

Exchequer.

PUTNEY *v.* SWANN.

A plea pleaded generally must be taken as pleaded to the whole declaration. If such a plea be no answer to one count of a declaration, the proper course is to demur specially.

ASSUMPSIT. The first count in the declaration was on a bill of exchange by the payee against the acceptor; the second, on an account stated. The defendant pleaded that he did not accept the said bill of exchange in the said declaration mentioned;—not pleading at all to the second count.

Special demurrer—assigning for cause that the plea did not answer the whole declaration.

Joinder.

Francillon, in support of demurrer.—This plea must be taken to be pleaded to the whole of the declaration, by the 9th rule, *Hilary* Term, 4 W. 4;—"In a plea intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment; and all pleas pleaded without such formal parts as aforesaid shall be taken, unless otherwise expressed to be pleaded in bar of the whole action." [*Parke*, B.—That rule has no application to this case; the distinction there is between pleas *in bar of the action* and *the further maintenance of the action*.] On the authority of *Worley* v. *Harrison* (*a*), the plea is bad, as not answering the whole declaration. It is not pleaded with any restriction, and must therefore be taken as pleaded to the whole declaration, to which it clearly is no answer. In 1 *Williams' Saunders*, 28 (n.) 3, it is laid down, "If a plea begin with an answer to the whole declaration, but in truth the matter pleaded is only an answer to part, the whole plea is bad, and the plaintiff may demur." In *Vere* v. *Goldsborough* (*b*), where, to a declaration similar to this, the defendant pleaded that he did not accept, and that he did not account, without confining his pleas to the respective counts, upon which the plaintiff signed judgment, no rule having been obtained to plead several matters, *Tindal*, C. J. said, "I think the plaintiff should have demurred specially, and not have taken upon himself to sign judgment. The defendant has fallen into a breach of the rules of pleading rather than of practice. The question might have been raised on special demurrer." The proper course has therefore been taken in this instance by demurring specially.

Chadwicke Jones, contrà.—The case of *Worley* v. *Harrison* is not in point. This plea does not profess to answer the whole declaration; it expressly says, the "said bill in the declaration mentioned," and there is but one bill; it is a good answer to that part of the declaration to which it applies, namely, the first count; and as to the second count, the plaintiff should have signed judgment.

Francillon in reply.

Lord ABINGER, C. B.—This plea must be taken to be pleaded to the whole declaration, as nothing is stated to confine it to either count; the plaintiff,

(*a*) 3 Adol. & Ellis, 669. (*b*) 1 Bing. N. C. 353.

therefore, could not have signed judgment. It is clear that the plea gives no sufficient answer to the whole of the plaintiff's demand. Judgment must therefore be given for the plaintiff.

PARKE, B.—The rule of court has been misunderstood. It is only meant to apply to the difference between pleas in bar of the whole action, and those in bar of the further maintenance of the action. All are now taken to be in bar of the action unless the contrary is expressed.

ALDERSON, B., and GURNEY, B., concurred.

Judgment for the plaintiff.

CLARK *v.* CHAMBERLAIN.

TROVER for certain goods and chattels, to wit, two anchors, two hawsers, and two cables, &c., the property of the plaintiff. *Pleas*—first, not guilty; secondly, as to the said goods in the declaration mentioned, except as to one anchor and one hawser, that the plaintiff was not lawfully possessed, as of his own property, of the goods and chattels in the declaration mentioned, or any of them, *modo et formâ;* thirdly, that before the time of the committing of the grievances in the said declaration mentioned, in respect of the said anchor and hawser, parcel, &c., the said anchor and hawser had been and were parted with, and left by a certain ship or vessel of the plaintiff, on a certain coast of this kingdom, to wit, the coast of the county of *Essex;* and being separated with and left thereupon, had been and were taken up, and taken possession of at sea, on the said coast, by one *Thomas Mills* and other persons, who thereupon afterwards, and upon and after their arrival at a certain port in the said county of *Essex*, to wit, the port of *Colchester*, being the port at which they first arrived with such articles so found as aforesaid, and before the committing of the said grievances as to the said anchor and hawser, parcel, &c., to wit, on the day and year aforesaid, according to and in pursuance of the provisions of a certain statute, passed in the session of parliament held in the first and second years of the reign of his late majesty, King Geo. 4; and in such case made and provided, duly delivered the said anchor and hawser into and deposited the same in the proper place appointed by the Right Honourable *Henry Viscount Maynard*, then and still being vice-admiral of the said county of *Essex*, and maritime parts thereof and to the same adjoining, as such vice-admiral as aforesaid, for safe custody until the same should be claimed by the owner or owners thereof, or his, her, or their agent or agents, and the salvage, together with such other charges and expenses as are in the said act directed to be paid in respect of such articles, should be paid by him or them, or security given for the payment thereof to the satisfaction of the salvors thereof. And the defendant further says, that *Charles George Parker*, Esq., being then and still deputy of the said vice-admiral in his said office of vice-admiral as aforesaid, and the defendant being then and still the agent at and for the port aforesaid, of and for the said *Charles G. Parker*, in his said office of deputy vice-

The words *left by any ship* in stat. 1 & 2 G. 4, c. 75, s. 1, do not apply to articles attached to a vessel, although no one be left in charge of them. Where a public officer received goods, the detention of which was not justified by this Act of Parliament, and refused to give them up to the owner without payment of salvage, *Held*, to be evidence of a conversion.

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admiral as aforesaid; the defendant, as such agent as aforesaid, did thereupon receive the said anchor and hawser, parcel, &c. into the said place so appointed for safe custody as aforesaid, and had and kept the same there for the purposes in that behalf aforesaid; and the defendant says, that because the plaintiff being the owner of the said anchor and hawser, parcel, &c. hath not paid or offered to pay the salvage, and the said other costs and expenses of right payable in respect thereof as aforesaid, nor given security for the payment thereof to the satisfaction of the said salvors; and that the salvage and such other costs and expenses as aforesaid, were and still are wholly unpaid and unsatisfied, nor hath any such security been given for the payment thereof as aforesaid; the defendant refused to deliver the said anchor and hawser, parcel, &c. to the plaintiff on his demand of the same, and hath hitherto kept and detained the same, and still keeps and detains the same until the salvage and the said other costs and expenses, of right payable in respect thereof, shall be paid, or security given for the payment thereof, to the satisfaction of the said salvors, which are the same supposed grievances in respect of the said anchor and hawser, parcel, &c. in the said declaration mentioned, whereof the plaintiff hath above thereof complained against the defendant, and this the defendant is ready to verify, &c.

Replication to the last plea, *de injurid.*

At the trial, before Lord *Abinger*, C. B., at *Guildhall*, it appeared that a brig called the *Amore*, went on shore on the coast of *Essex*, on the 22nd of *March*, within the limits of the vice-admiralty of *Essex*. On the 31st, two persons of the name of *Mills*, found the brig with her deck under water, and no one on board or near her. They took away the anchor and hawser among other things, and delivered them to the defendant, who was deputy vice-admiral of *Essex*, and deposited them in the admiralty warehouse, having previously made a report in the book kept by the defendant for that purpose. It appeared that the anchor and hawser belonged to the plaintiff, who had attached them to the brig for the purpose of saving her, and who at the time the *Mills* were carrying away the things from the brig, came to them and demanded the anchor and hawser as his property. The *Mills* refused to deliver them up, stating that they had found them on the wreck and abandoned; and the defendant, upon a subsequent application being made to him by the plaintiff, refused to deliver them up unless the salvage was paid, or security given for its payment. The plaintiff had left the brig to carry away some goods, and intended to return to her again. The jury, under the direction of the learned judge, found a verdict for the plaintiff.

Knox moved for a new trial, on two grounds. First, that the special plea which was framed in the first section of the stat. 1 & 2 G. 4, c. 75, was sufficiently made out in evidence; and secondly, that nothing was proved amounting to a conversion by the defendant. He contended, on the first point, that the expression, *articles left by any vessel at sea*, used in that section, applied to such a case as the present, where at the time the anchor and hawser were first found, there was no one near to take care of them, and that its meaning could not be confined to cases of absolute wreck. The defendant was, therefore, justified in detaining them, according to the provisions of the statute until salvage was paid. As to the other point, the defendant was acting in

his capacity of public officer, with duties specified by the act of parliament, viz.—to receive all goods delivered to him, and keep them in safe custody until claimed by the true owner, and the salvage paid. It is no part of his duty to decide either as to the right of property in the goods, or the liability to pay salvage; by s. 7, that power is given to three justices in case of dispute. His refusal to deliver up the articles except on payment of the salvage, did not, therefore, amount to a conversion. A demand and refusal are only evidence of a conversion, and may be explained, by showing that there was lawful ground for the refusal by the defendant. Buller's N. P. 45. The defendant has merely the custody of these things by virtue of his office; they were not taken with the intention to convert; the possession was in the salvor. [Lord *Abinger*—The conversion arises from the refusal to give up.] In *Alexander* v. *Southey* (*a*), where goods of the plaintiff were carried to the warehouse of an insurance company, the key of which was kept by the defendant, who, on being applied to, refused to deliver them up without an order from the company, this was held not to amount to a conversion. [Lord *Abinger*—The difference between that case and the present is this:—there the refusal was not absolute; here the defendant assigns no reason, but refuses absolutely to give the things up to the plaintiff. *Parke*, B.—His proper course would have been, to have made inquiries, and to have refused to deliver up the articles until the justices had determined whether any thing was due.]

PARKE, B.—I am of opinion that there ought to be no rule. The defendant should have pleaded according to the fact, that the goods were brought to him; instead of that he has pleaded, that the anchor and cable were left at sea; to be so within the meaning of the act, they must be detached from the vessel—here they were affixed. As to the plea of not guilty, if the defendant had said, I shall keep these things until the question is settled by the proper authority, there would not have been a conversion; here, he demanded salvage.

ALDERSON, B.—To support the defendant's argument, the words "left at sea," must be taken as applying to all goods so found, whether derelict or not. The words of the statute clearly will not bear this construction.

Lord ABINGER, C. B.—The anchor and hawser were attached to a vessel. The statute only applies to articles left; the *Mills* committed something very like a felony, and the defendant, by refusing absolutely to give the things up to the plaintiff, rendered himself liable as adopting the acts of the party taking them.

GURNEY, B., concurred. Rule refused.

(*a*) 5 B. & Ald. 247.

Exchequer.

RAY *v.* JONES.

To make an entry in the hand-writing of a person deceased, evidence, it must be proved not only to have been made in the regular course of business, but to have been made at the time it bears date or immediately after.

ASSUMPSIT by indorsee against acceptor of a bill of exchange. *Plea*—payment. At the trial, before Lord *Abinger*, at *Guildhall*, *Goode*, the drawer was called to prove payment to the plaintiff; and in order to shew the actual state of accounts between the parties, it was proposed to give in evidence an entry in a banker's book, in the handwriting of a deceased partner; but it did not appear when the entry was made. The learned judge rejected the evidence, and the jury found a verdict for the defendant.

Erle now moved for a new trial, on the ground that the evidence had been improperly rejected, as the entry was made in the ordinary course of business, and the party making it could have had no interest in the matter. *D.* d. *Pattershall* v. *Turford* (*a*), *Dicas* v. *Poole* (*b*). [*Parke*, B.—In *Doe* v. *Turford*, many other facts concurred.]

Per Curiam.—To make entries of this kind evidence, they must not only be made in the regular course of business, but it must be proved that they were made either at or immediately after the time they bear date; nothing appears here to shew when this was made: that is fatal.

Rule refused.

(*a*) 3 B. & Adol. 890. (*b*) 1 Bing. N. C. 649.

ELSWORTH *v.* COLE.

Time bargains in foreign stock are not illegal, either at common law or under the Stock Jobbing Act, 7 G. 2, c. 28.

ASSUMPSIT for money paid, &c. *Plea*—that the cause of action arose out of time bargains in stock. At the trial, before Lord *Abinger*, C. B., at *Guildhall*, it appeared that the action was brought to recover money paid by the plaintiff, a stockbroker, on account of the defendant, for time bargains in different foreign funds. The plaintiff obtained a verdict, the learned judge being of opinion, that there was nothing illegal in such a transaction.

Sir *W. Follett*, moved for a new trial.—If this Court supports the decisions of the Court of Common Pleas in *Wells* v. *Porter* (*a*) and *Oakley* v. *Rigby* (*b*), undoubtedly this verdict must stand.

Lord ABINGER, C. B.—We are not disposed to interfere with those decisions.

Rule refused.

(*a*) 2 Bing. N. C. 722, 2 Scott, 141. (*b*) 2 Bing. N. C. 732; 2 Scott, 194.

Rex *v.* Sheriff of Middlesex.

In the cause of Bartor *v.* Morgan.

Humfrey obtained a rule to shew cause why the attachment against the sheriff for not bringing in the body, and all subsequent proceedings, should not be set aside for irregularity. It appeared that the defendant was arrested early in the month of *September*, and the sheriff being ruled to return the writ, made a return of *cepi corpus* on the 19th. On the 29th *September*, the old sheriff went out of office, and an order of Mr. B. *Bolland*, dated *October* 4th, to bring in the body, was served on the new sheriff, in which order the word *late* sheriff was not inserted; this order was made a rule of court, and an attachment obtained against the sheriff; and *Humfrey* contended, that the plaintiff had ruled the wrong sheriff, as the defendant was arrested by the late sheriff, and the present one had made no default. The Court being of this opinion, *Erle*, who shewed cause, objected that the affidavits and rule were not correctly entitled, as no attachment had actually issued against the sheriff, and he was consequently not before the court; the affidavits should have been entitled in the cause.

An attachment though not served, is a proceeding against the sheriff, in which the affidavits to set the attachment aside, should be entitled.

Humfrey.—The rule was obtained upon affidavits entitled both ways. It is impossible for us to know, whether an attachment has been issued or not. The sheriff is sufficiently before the Court, as soon as an attachment is granted against him; this is a proceeding against him, and we must entitle our affidavits accordingly.

Per Cur.—The rule for an attachment, is a proceeding against the sheriff, bringing him into contempt; as soon as that is granted, proceedings have commenced against him; and the affidavits are, therefore, rightly entitled, and the order must be set aside as made on the wrong sheriff. The affidavits to set aside the order should have been entitled in the cause.

Rule absolute without costs.

Price *v.* Morgan.

ASSUMPSIT. The first count of the declaration stated, that in consideration that the plaintiff would send a pony to the defendant, and would sell and deliver it to one *Ward*, the defendant undertook and promised the plaintiff that he was authorized by *Ward* to purchase it on his behalf; the declaration

In assumpsit, the first count of the declaration stated that the defendant, in consideration that the plaintiff would send a pony to the defendant, and consent to sell it to a third, promised that he had authority from that third person to buy it on his account; the second count stated the defendant's promise to be, to buy the pony himself:—*Held*, that the action was in substance for the price of the pony, and that therefore it might be tried before the sheriff, under the 3 & 4 W. 4, c. 42. s. 17.

Qu. Whether the Court will set aside a trial before the sheriff, upon the motion of the party at whose instance the writ of trial was obtained, on the ground that the action was not within the stat.

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PRICE v. MORGAN.

then averred that he sent the pony to the defendant, and was willing to sell it to *Ward*, but that the defendant had no authority from *Ward* to purchase it on his behalf. The second count stated the contract to be, that the defendant promised to purchase the pony. The third count was in *indebitatus assumpsit* for a pony sold and delivered. The fourth was on an account stated.

Plea—Non-assumpsit.

The cause was tried before the under-sheriff of *Herefordshire*, and the plaintiff was nonsuited.

Peacock obtained a rule to arrest the judgment, or set aside the proceedings, on the ground (*a*) that this was a case which was not within the stat. 3 & 4 W. 4, c. 42, s. 17, authorizing the trial of certain issues before the sheriff.

J. W. Smith shewed cause, on an affidavit that the judge's order for the issuing the writ of trial had been made at the instance of the plaintiff. It is contended, on the other side, that the contract set out in the declaration is not one that comes within the stat. authorizing trials of issues before the sheriff, as being a demand of unliquidated damages, and that therefore the proceedings before the under-sheriff were *coram non judice;* but if that be so, this form of application is improper; it ought to be to set aside the writ. But the plaintiff is not now in a condition to take the objection in any form, for it was at his instance the writ was sent to the sheriff, and therefore he cannot now say it was improperly sent. [*Parke*, B.—The substance of the demand is for the price of the pony.] It is a very different case from that of *Watson* v. *Abbott* (*b*), which was an action on the case for running down a vessel. *Edge* v. *Shaw* (*c*) is no authority in support of the rule.

Peacock, contrà.—A purview of the whole clause of the stat. 3 & 4 W. 4, c. 42, s. 17, shews clearly that the intention of the legislature was, that it should apply only to liquidated demands, such the amount of which by the R. H. 2 W. 4, s. II., it is necessary to indorse on the writ. In *Watson* v. *Abbott*, and *Edge* v. *Shaw*, the order for the writ of trial was obtained by the plaintiff.

PARKE, B.—I am of opinion that this action is, in substance, for the price of the pony, and therefore within the statute; if not, I should hesitate when the plaintiff himself has obtained the writ, in granting a new trial, on the ground that the issue ought not to have been sent to the sheriff. The point arose in *Watson* v. *Abbott*, but does not appear to have been sufficiently considered. It is unnecessary, however, to give an opinion on that, because, on the other ground, I think the case within the act.

The other judges concurred.

Rule discharged.

(*a*) A rule was also granted on the ground of misdirection; but on shewing cause, it appeared that the only affidavit stating the facts that occurred at the trial, was made by the clerk of the plaintiff's attorney's *London* agent, who was not present at the trial. The only notes made contained the word "nonsuit." The Court held clearly that such an affidavit was inadmissible as evidence of what took place at the trial; and they also said it was highly reprehensible in the under-sheriff not to have made a correct report.

(*b*) 2 Cr. & M. 150.

(*c*) 2 C. M. & R. 615.

DOE d. THRELFALL *v.* WARD.

An action of ejectment is within the Small Debtors' Act, 48 G. 3, c. 123.

BUTT moved for a rule to discharge a defendant out of custody, under the stat. 48 G. 3, c. 123, he having been in prison more than twelve months, for the costs of an action of ejectment which were under 20*l*. He cited *Doe* v. ——— (*a*), as a decision of *Patteson*, J., that ejectment was within the stat. He stated that the other learned judge had come to a similar decision in a case not reported, and that *Coleridge*, J., had ruled the same way at chambers, and his ruling had been confirmed by the Court of King's Bench.

Cowling appeared to shew cause in the first instance, if the Court should consider the question open. *Sed,*

Per Curiam (*b*).—We must follow the record, and the judgment is undoubtedly for damages; it cannot make any difference that the damages are assessed at a shilling.

Rule absolute (*c*).

(*a*) 1 Dowl. P. C. 69.
(*b*) Lord *Abinger*, C. B., *Parke*, B., and *Alderson*, B.
(*c*) This case overrules the case of *Doe* v. *Reynolds*, 10 B. & C. 481.

BAKER *v.* BROWN.

Where plaintiff's counsel in an undefended action, took a verdict for the principal of a mortgage debt without the interest, the Court refused to increase the verdict.

THIS was an action on a mortgage-deed for recovery of the principal and interest; the cause was undefended, and, by mistake, the plaintiff's counsel took a verdict for the principal money only, and it was so entered on the judge's notes and on the record.

Petersdorff now moved to increase the amount of the verdict, by adding the sum due for interest, and cited a case in Godbolt's Reports, where the Court increased a verdict, taken by mistake for single damages only, where the party was entitled to treble damages. *Baldwin* and *Gwine's* case, Godbolt, 245.

Per Curiam.—There the Court gave the finding of the jury its legal effect; but here, we can do nothing more that set aside this verdict, and direct a new trial: we cannot amend the record in the absence of the other party.

Motion refused.

Exchequer.

SALTER *v.* YATES.

Semble, where a cause is referred, a verdict being taken subject to the certificate of an arbitrator, that it is no objection to the certificate that it was made after the time of the return of the jury process.

KELLY obtained a rule to alter the entry of a verdict, which the master made upon the certificate of a surveyor, to whom the question (upon a building bill,) of the amount had been referred at the trial.

Humfrey, in shewing cause, objected that the certificate was a nullity, it having been made after the time of the return of the jury process; and the arbitrator being put in the place of the jury only, his authority was at an end. No order of *nisi prius* had been drawn up.

Per Curiam.—It does not appear that any objection was made to proceeding on the reference on that ground. The object of a certificate is to save the expense of an order of *nisi prius*, and of an award.

Rule absolute.

BAILEY, Assignee of CALLIS, an Insolvent Debtor, *v.* CHITTY.

No suggestion can be entered to deprive a plaintiff of costs, under the *Middlesex* Court of Requests' Act, unless the defendant resides, and the cause of action also arises, within the county.

DEBT for goods sold and delivered, and work and labour done by the insolvent, and on an account stated between the insolvent and defendant.

Pleas—first, *nunquam indebitatus;* second, Statute of Limitations; third, set-off.

At the *Middlesex* sittings after last term, the plaintiff recovered a verdict for 1*l.* 19*s.* 9*d.*, being the sum due to the insolvent for work and labour as a broker, in levying a distress at *Richmond*, in *Surrey*, and 1*s.* damages; but failed, as to the residue of his demand, from lapse of time—the defendant was resident in *Middlesex*.

Platt obtained a rule to shew cause why a suggestion should not be entered to deprive the plaintiff of his costs, under the *Middlesex* Court of Requests' Act, stat. 23 G. 2, c. 33.

Miller shewed cause.—This application must fail, for three reasons:—first, the original demand was for more than 40*s.*, although reduced by the Statute of Limitations being pleaded; the plaintiff, therefore, could not have sued in the inferior court. This act has been held not to apply to a case where the claim was reduced by set-off. *Jenkinson* v. *Morton* (*a*). Here the plaintiff certainly had good reason for suing for the whole amount due. The whole debt was actually in existence, though the remedy for enforcing it was barred by the Statute of Limitations being pleaded. It was his duty, as assignee, to get in all the debts due to the insolvent's estate; and as this appeared to be a debt above 40*s.* by the insolvent's schedule, and he had no means of knowing that the Statute of Limitations would be relied on, it was his duty to sue for the whole amount in the superior courts. It is discretionary

(*a*) 1 M. & W. 300.

with the Court to order a suggestion to be entered; and where a plaintiff appears to have had reasonable and probable cause, as in this instance, the Court will not deprive him of his costs. *Horn* v. *Hughes* (*b*), *Hersant* v. *Larkin* (*c*).

Secondly, the whole cause of action in respect of which the plaintiff recovered, was not cognizable by the *Middlesex* Court, whose jurisdiction only extends to causes of action arising within the county, whereas this arose entirely in the county of *Surrey*. Tidd's Pr. 516, 9th ed. *Harwood* v. *Lester* (*d*), *Smith* v. *O'Kelly* (*e*), *Welch* v. *Froyte* (*f*), *Tubb* v. *Woodward* (*g*).

Thirdly, the plaintiff in fact recovered more than 40*s*. reckoning the debt and damages together.

Platt, contrà.—The ground of the action was the contract, which was made within the jurisdiction of the inferior court; it is immaterial where the breach took place. The defendant was resident in *Middlesex*, and therefore *liable to be summoned.* [*Parke*, B.—But was he liable to be summoned for this debt?]

PARKE, B.—To enable a party to sue in this court, not only must the defendant reside, but the cause of action must arise, within the jurisdiction; here the work, for which this action is brought, was performed in the county of *Surrey*.

Rule discharged.

(*b*) 8 East, 347.
(*c*) 3 Brod. & B. 257.
(*d*) 3 Bos. & P. 617.
(*e*) 1 Bos. & P. 75.
(*f*) 2 H. Bl. 29.
(*g*) 6 T. R. 175.

SHANE *v.* SPADE.

Bail, in a town cause, may justify in person, although their affidavit of justification is insufficient.

AN objection was taken to the affidavit of justification of bail in this, which was a town cause, for not stating where the property was situate.

Humfrey, in support of the bail, stated that they attended to justify in person.

Butt cited the case of *Penson's Bail* (*a*), where *Patteson*, J. held that bail attempting to justify under the new rules, and not complying with them, cannot resort to any other mode. Those were country bail.

Per Curiam.—The plaintiff may oppose these bail without the risk of costs, in case he fails; but if they appear in person they may justify.

The bail justified.

(*a*) 4 Dowl. P. C. 627.

Exchequer.

BOLTON *v.* JOHNSON.

A plaintiff having declared *de bene esse*, and afterwards obtained time to join in demurrer, cannot oppose the defendant's bail.

BUTT objected to the bail in this cause being opposed, on the ground that the plaintiff, having obtained a judge's order to join in demurrer, had waived any objection to the bail. The plaintiff declared *de bene esse;* to this declaration the defendant demurred; and the plaintiff, after attempting to set aside the demurrer as frivolous, obtained a baron's order to join in demurrer.

Steer contended that, as the bail came to justify, they might be opposed by the plaintiff.

Per Curiam.—The defendant is already in court, and the plaintiff has asked for time to answer. The bail cannot be called on to justify, nor can they be opposed.

M'DOWALL *v.* LYSTER.

The Court will not, after the time of pleading has expired, allow a defendant, in an action on a cheque, to add a plea shewing that he executed the cheque in contravention of stat. 9 G. 4, c. 49, s. 15.

SEWELL moved for leave to add a plea, that the banker's cheque upon which this action was brought, was drawn more than fifteen miles from the place where it was payable, and was falsely dated, contrary to the provisions of the stat. 9 G. 4, c. 49, s. 15. The time for pleading had expired.

Per Curiam.—If the defendant wished to raise the question, he ought to have denied making the check. He has knowingly executed this instrument in an illegal manner, and now calls upon the Court to assist him in defeating it.

Rule refused.

COX *v.* SALMON.

A demand of the costs in the cause by the plaintiff's attorney, is sufficient to obtain an attachment, although the master's *allocatur* does not direct them to be paid to him.

SHEE moved for an attachment for non-payment of costs. The master's *allocatur* did not direct the costs, which were costs in the cause, to be paid to the plaintiff's attorney; and the officer of the court was doubtful whether a demand, by the attorney, was sufficient.

Per Curiam.—The attorney has authority to receive the costs in the cause; and a demand by him is, therefore, sufficient, without any express declaration to that effect by the master.

Rule granted.

The ATTORNEY-GENERAL *v.* PARSONS.

Exchequer.

In an information of intrusion, the crown may lay the venue in any county, and try it in a different county from that in which the venue is laid.

The title of the crown may be tried without a previous inquest of office, although the defendant has been in undisturbed possession for twenty years.

A *talcs* may be prayed for the crown in the absence of the A.-G., and without his warrant. *Semble.*

INFORMATION of intrusion on the wastes of the Crown within the manor of *Iscred*, in the county of *Radnor*. In *Trinity* Term, the attorney-general prayed that the information might be tried in the county of *Hereford*, on an affidavit, stating, that a fair trial could not be had in the county of *Radnor*, where the venue was laid, and that there were not forty-eight persons within that county qualified to serve as special jurors. He cited *Rex* v. *Webb* (*a*), to shew that the Crown may select its own county, and lay the venue thus, "In the county of *Radnor*, to wit, in the county of *Hereford*." He also cited *Manning's* Exchequer Practice, 179, where it is laid down, that, in an information of intrusion, the Crown may lay the venue in any county; but he admitted that he had been unable to find a precedent of any such application as the present, namely, that the trial might take place in a different county from that in which the venue was originally laid, and within which the lands were situated.

The Court, however, held, that the Crown was entitled to select its own county, and change the venue when laid, and granted the application.

The trial took place at the *Hereford* summer assizes, before *Patteson*, J., and the title of the crown to the manor of *Iscred* was clearly made out; but it was urged, on behalf of the defendant, that as the encroachments in question had been made more than twenty years, the title of the crown should first have been found by inquest of office, and then the possession recovered by information of intrusion, according to the stat. 21 Jac. 1, c. 14, s. 4, which enacts, "That whenever the king, his heirs, or successors, and such from and under whom the king claimeth, and all others claiming under the same title under which the king claimeth, hath been or shall be out of possession by the space of twenty years, or hath not or shall not have taken the profits of any lands, tenements, or hereditaments, within the space of twenty years before an information of intrusion brought, or to be brought, to recover the same, in every such case the defendant or defendants may plead the general issue, if he or they shall so think fit, and shall not be pressed to plead specially; and that, in such cases, the defendant or defendants *shall retain the possession he or they had at the time of such information exhibited, until the title be tried, found, and adjudged for the king.*" The learned judge overruled the objection, and a verdict was found for the crown.

Curwood now moved, by leave of the learned judge, for a rule to shew cause why a verdict should not be entered for the defendant, or a new trial had, and contended that as an information of intrusion was only brought to recover possession, the obvious meaning of the statute in requiring the title of the crown to be proved where there had been twenty years' adverse possession, was, that the title of the crown should be made out by a previous and distinct proceeding at common law. [Lord *Abinger*—At common law the defendant must have shewn his title and proved it; this statute, in the case of twenty years' possession, throws the *onus* of proof on the crown.] He also

(*a*) Ventris, 17.

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ATTORNEY-GENERAL v. PARSONS.

objected that a *tales* had been prayed at the trial, for the crown, without the attorney-general's warrant being produced, the attorney-general himself not being present.

Lord ABINGER.—There is nothing in the statute to make a previous inquest of office requisite. The defendant has this advantage given him, that he cannot be dispossessed, until the title of the crown has been satisfactorily established. After twenty years' undisturbed possession, the crown stands to the intruder in the same relation as a subject would, and must recover on the strength of its own title. The attorney-general is here a party on the record, appearing by his counsel. I do not think it is competent for any one but him to make the objection as to praying a *tales* improperly.

ALDERSON, B.—The effect of the statute of *James* is, that it is not sufficient for the crown to prove an intrusion by the defendant, unless it also proves its own title.

Rule refused.

It was found, on inquiry, that a warrant was actually attached to the record.

READE *v.* DUTTON and others.

The Court will not grant an attachment for non-performance of an award, where the reference was to two, with power to appoint a third arbitrator, they or any *two of them* being authorized to enlarge the time, and the two original arbitrators enlarged the time for making the award before they had appointed the third.

WIGHTMAN shewed cause against a rule for an attachment for the non-performance of an award. The cause was referred to two arbitrators, with power to appoint a third; the award to be made on or before the first day of *Easter* Term then next, or on such other day as they the said arbitrators, *or any two of them*, should appoint. The time was enlarged by the two original arbitrators, previously to their appointing the third. This, he contended, was not in accordance with the terms of the submission; and cited an unreported case of *Hughes* v. *Garrett*, K. B. 1822, Mich. Term, in which the Court held, that, where it was clearly contemplated that the time should be enlarged by two *out of three* arbitrators, the two original ones could not do so effectually until the third was appointed.

Chandless, in support of the rule, relied on *In the Matter of Hick* (*a*), where a subsequent appearance of the parties before the arbitrators was held to amount to a waiver of a similar objection; and contended, that a party intending to rely on such an invalidity, should not have allowed any award to be made, but have refused to proceed any further in the matter.

PARKE, B.—If this were an application to set the award aside, it might, perhaps, amount to a waiver; but no attachment can be granted, unless the terms of the rule of court have been strictly complied with.

Rule discharged.

(*a*) 8 Taunt. 694.

ALDERSON *v.* JOHNSON.

A declaration is sufficient, though it pursues the old form of describing the plaintiff as a debtor to the king, and concluding with a *pro minus*, though such may be struck out on summons as surplusage.

ASSUMPSIT on a bill of exchange. In the commencement, the declaration stated the plaintiff to be a debtor of the king, and concluded with a *quo minus sufficiens*, &c., in the old form.

Special demurrer, assigning for cause, "that the commencement and conclusion of the declaration improperly state the ancient, and now abolished, fiction of the plaintiff being a debtor to the king, with a *quo minus* conclusion; and is not in accordance with the form prescribed, and now in force, for the commencements and conclusions of declarations in the Exchequer."

Crowder, in support of the demurrer.—The general rules of court of Mich. Term, 3 W. 4, give a specific form for commencing and concluding declarations in this court, and any deviation from that form is bad on special demurrer. This is not a mere addition, which might be rejected as surplusage, but an entirely different form.

Wallinger, contrà, was stopped by the Court.

Per Curiam.—This is mere matter of form, and might have been struck out, on summons, as surplusage.

Judgment for the plaintiff.

CHARRINGTON *v.* METHERINGHAM and another.

A parish officer, sued in trespass for distraining for poor and highway rates, is not entitled to treble costs in case the plaintiff is nonsuited.

TRESPASS against the defendants, who were parish officers, for distraining the plaintiff's goods for poor and highway rates. At the trial, at the *Northampton* spring assizes, the plaintiff was nonsuited for not proving any notice of action. *Miller* obtained a rule to review the master's taxation, he having allowed the defendants treble costs.

N. Clarke shewed cause.—The defendants, in this case, were entitled to treble costs. The Poor Law Acts, 43 Eliz. c. 2, s. 19, and 13 & 14 Car. 2, c. 12, s. 20, give treble damages to parish officers, sued for any acts done in that capacity, in case the plaintiff is nonsuited; and damages in these acts must, of necessity, include costs. The Highway Act, 13 G. 3, c. 78, s. 81, gives treble *costs* to the defendant in case of nonsuit.

Miller, contrà.—The statute of Eliz. gives the party so sued "treble damages and his costs;" but, in *Butterton* v. *Fuller* (*a*), this was held to entitle an avowant in replevin to single costs only. The new Highway Act, 5 & 6 W. 4, c. 50, which repeals the former Highway Act, contains no proviso as to treble costs.

(*a*) 1 Brod. & Bing. 517.

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Per Curiam.—The statute of *Charles* cannot affect these defendants; and the case cited is decisive as to the effect of the stat. of Eliz. As regards the highway rates, the new statute says nothing about treble costs.

Rule absolute.

WHITE *v.* IRVING.

An affidavit of debt is good, although not entitled of any court, and sworn, in *Scotland*, before a person stating himself to be a commissioner for taking affidavits in the Courts of C. P. and Exch.

PETERSDORFF applied to discharge the defendant out of custody for a defect in the affidavit of debt, which was not entitled in any court, and was sworn in *Scotland*, before a person stating himself to be a commissioner to take affidavits in the Courts of Common Pleas and Exchequer. He contended that this affidavit was insufficient, as perjury could not be assigned on it.

Per Curiam.—This affidavit is sufficient. An indictment for perjury might be sustained on an allegation that it was made by the plaintiff for the purpose of arresting the defendant.

Motion refused.

REED *v.* SPURR, Administrator.

A plea of *plene administravit* need not be signed by counsel.

ASSUMPSIT. Defendant pleaded *plene administravit*, and the plaintiff signed judgment, the plea not being signed by counsel.

Mansel moved to set aside this judgment, and cited *Tidd's* Practice, 9th ed., 671, where various pleas, including this, are enumerated, which, although concluding with a verification, need not be signed by counsel.

Sewell shewed cause in the first instance, and contended, that, as the plea introduced new matter, it must conclude with a verification, and be signed by counsel, in the same manner as a plea of the Statute of Limitations. *Macher* v. *Billing* (*a*).

Lord ABINGER.—By the practice of this court, as certified to us by the Master, this plea need not be signed by counsel. The judgment is, therefore, irregular, and must be set aside with costs.

Rule absolute, with costs.

(*a*) 1 Cr., M., & Ros. 577.

COPE *v.* ROWLANDS.

A stockbroker, in the city of *London*, cannot recover for work done as a broker, unless duly licensed by the mayor and aldermen of the city of *London*, under the stat. 6 Anne, c. 16.

ASSUMPSIT for work and labour and commission due from defendant to plaintiff, and for money paid, with a count for interest, and also on an account stated.

Pleas—first, non-assumpsit; second, set-off; third, to the first count, that the work, labour, &c., in that count mentioned and therein alleged to have been performed, &c., was bestowed by the plaintiff within the city of *London* as a broker, to wit, a stockbroker, in and about the purchasing and selling for the defendant, and bargaining on account of the said defendant for divers shares and interests, and shares in divers public stocks and securities, and that the commission, in the said first count mentioned, was commission claimed by the plaintiff in respect of such work, &c., so done and performed by him as a stockbroker; and the defendant saith that the plaintiff was not, at the time or times, or any of them, of doing, performing, and bestowing the said work, &c., or any part thereof, a broker duly licensed, authorized, or empowered, to act or practise as a broker in the premises, or any of them, within the city of *London;* concluding with a verification.

Replication de injuriâ, to the last plea; and to the set-off, *nil debet*.

At the sittings after last *Trinity* Term, at *Guildhall*, before *Parke*, B., it was proved that the plaintiff was not a sworn broker of the city of *London*. The jury, under the direction of the learned judge, found a verdict for the plaintiff, on the issues joined on the first and second pleas, and for the defendant on that joined on the third, assessing the damages separately on the first and following counts.

Bompas, Serjt., having obtained a rule to enter up judgment for the plaintiff, for the issue joined on the third plea, *non obstante veredicto*, on the ground that the plea was bad in law;

Platt and *Petersdorff* shewed cause.—The third plea is clearly a good answer to the cause of action disclosed in the first count of this declaration. The stat. 6 Anne, c. 16, s. 4, enacts, "That all brokers, who shall act as brokers within the city of *London* and liberties thereof, shall, from time to time be admitted so to do by the court of the Lord Mayor and Aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behaviour as that Court shall think fit and reasonable; and shall upon such their admission pay to the chamberlain of the said city for the time being, for the uses hereinafter mentioned, the sum of 40*s.*; and shall also yearly pay, to the said uses, the sum of 40*s.* upon the 29th day of *September*, in every year." After providing for the application of the monies to be thus paid, it contains the following proviso: "That if any person shall take upon him to act as a broker, or employ any other under him to act as such, within the said city and liberties, not being admitted as aforesaid, every such person so offending shall forfeit and pay to the use of the said lord mayor and commonalty and citizens of the said city, for every such offence, the sum of 25*l.*, to be recovered by action of debt," &c. It is true that the former act of 8 & 9 W. 3, c. 32, which expressly prohibits a broker from acting as such without being duly licensed, had expired before this statute of Anne was

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passed; but the intention of the legislature was obviously to protect the public, by preventing persons from acting as brokers unless they were duly qualified. It has been very recently decided, that a stockbroker is a broker within the meaning of the statute of Anne, and the 57 G. 3, c. 60. *Clarke* v. *Powell* (*a*). Unless, therefore, these are to be considered as mere revenue acts, the plaintiff cannot recover. Various old statutes have been passed for the regulation of brokers and protection of the public from fraud: the stat. 13 Edward 1, c. 5, which has not been repealed, and the stat. 1 James 1, c. 21. The breach of a mere revenue law has been held insufficient to prevent a plaintiff from recovering, as in *Johnson* v. *Hudson* (*b*), where a factor had not entered himself with the Excise Office, as a dealer in tobacco, previous to his selling a quantity of that article; but where the intention of the statute was also to protect the public against fraud, no action can be maintained by any party who has not complied with its provisions. Thus in *Law* v. *Hodson* (*c*), where the plaintiff had sold bricks contrary to the enactment of the stat. 17 G. 3, c. 42, it was held that he could not recover. In many decided cases, both in courts of law and equity, it has been assumed that a broker without a legal qualification, could not recover any compensation for his services; *Gibbons* v. *Rule* (*d*), *Green* v. *Weaver* (*e*), *Exparte Dyster* (*f*). It may admit of great doubt, since the decision in *Brown* v. *Duncan* (*g*), whether that distinction between breaches of revenue laws and those passed for other purposes can be sustained. It may now be laid down, as a general proposition, that where a contract which a plaintiff seeks to enforce, is expressly or by implication forbidden by the statute or common law, no Court will lend its assistance to give it effect. *Forster* v. *Taylor* (*h*), *Lyson* v. *Thomas* (*i*).

Bompas, Serjt., *contrà*.—A stockbroker, although within the statute of Anne, and therefore liable to the penalties imposed thereby, may nevertheless be entitled to recover a compensation for work and labour bestowed at the defendant's request. The only enactment containing a direct prohibition, stat. 8 & 9 W. 3, c. 32, was suffered to expire; and the statute of Anne, which was substituted for it, contained no such provision, from which it may be assumed that the legislature only meant to impose a penalty, but not to invalidate the contracts themselves. The statute of Anne is not a general act; and in order to take advantage of an enactment applying to the city of *London* only, the defendant should have pleaded it specially. The intention of this act was only to raise the revenue of the city of *London*, by the sums to be paid for licenses; nothing in the statute shews that it was passed for the protection of the public against fraud. The mere imposition of a penalty is clearly insufficient to make a contract invalid. In *Gremaire* v. *Le Clerc Bois Valon* (*k*), a surgeon was held to be entitled to recover for business done, although liable to the penalty imposed by stat. 3 H. 8, c. 11, for not being duly licensed by the College of Surgeons. That statute contains no prohibitory clause, whereas the Apothecaries' Act does, which has always been held to constitute the difference between the right of surgeons and apothecaries to

(*a*) 4 B & Adol. 846.
(*b*) 11 East, 180.
(*c*) 11 East, 300.
(*d*) Bing. 301.
(*e*) 1 Simons, 404.
(*f*) 1 Merivale, 155.
(*g*) 10 B. & Cr. 93.
(*h*) 5 B. & Adol. 900.
(*i*) M'Cleland & Y. 119.
(*k*) 2 Camp. 144.

remuneration for the professional services. In *Exparte Dyster* (*l*), a case under this very statute, the broker was allowed to prove his debt, though contrary to the condition of his bond. No doubt if the act be passed to prevent fraud, no contract made in defiance of it can be enforced. This is established by *Law* v. *Hodson* (*m*), *Little* v. *Pool* (*n*), and *Bensley* v. *Bagnold* (*o*). But here there is no prohibition; nothing but a penalty imposed, which the the plaintiff undoubtedly means, but which in no way affects the validity of his contract, or his right to enforce it. *Johnson* v. *Hudson* (*p*), *Brown* v. *Duncan* (*q*), *Wetherell* v. *Jones* (*r*).

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

PARKE, B.—In this case, which was argued a few days ago, the plaintiff moved for judgment *non obstante veredicto*, on the ground that a plea in bar was bad in law. The plea was, that the work and labour, in respect of which the action was brought, was performed by the plaintiff as a broker in *London*, and that he was not duly licensed, authorized, and empowered to act as a stockbroker by the court of mayor and aldermen, pursuant to the statute. We are of opinion that the plea is good in substance, and consequently the rule must be discharged.

It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition. Lord *Holt*, *Bartlett* v. *Vinor* (*s*). And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract? In the cases of *Brown* v. *Duncan* (*t*), and *Wetherell* v. *Jones* (*u*), both cases of violation of the revenue laws, the particular contract sued upon was held not to be interdicted; and in *Johnson* v. *Hudson* (*x*), as explained in the judgment of the Court of King's Bench in *Foster* v. *Taylor* (*y*), the provision of the statute, which requires persons dealing in tobacco to take out a license, was held to be a regulation attaching to the plaintiff personally, and affecting him with the penalty, for the purpose of securing the licence duty only, and not forbidding the contract itself; though it is to be observed, that some little doubt has been thrown on the particular case in a very learned work, 2 Starkie on Evidence, 886. The principle, however, of that decision, as above explained, is correct; and the question for us now to determine is, whether the enactment of the statute 6 Ann, c. 16, (altered as to the amount of penalty by 57 Geo. 3, c. 60), is meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he

(*l*) 1 Merivale, 155.
(*m*) 11 East, 300.
(*n*) 9 B. and Cr. 200.
(*o*) 5 B and Ald 335.
(*p*) 11 East, 180.
(*q*) 10 B. & Cr. 93.
(*r*) 3 B. & Ald. 221.
(*s*) Carthew. 252.
(*t*) 10 B. & Cress. 93; 5 M. & Ry. 114.
(*u*) 3 B. and Ald. 221.
(*x*) 11 East, 180.
(*y*) 5 B. & Ald. 898; 3 Nev. and Man. 244.

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does not pay it? or whether one of its objects be the protection of the public, and the prevention of improper persons acting as brokers? On the former supposition, the contract with a broker for his brokerage is not prohibited by the statute; on the latter it is: for it cannot be permitted to a person to recover a compensation for an act which the law interdicts him from doing. In order to decide this point, it is only necessary to look at the statute itself. If its object had been simple the pecuniary advantage of the mayor and corporation, it would have been wholly unnecessary to have made any provision for securing the good conduct of the persons admitted. The more that should be allowed to practise the larger the revenue of the city; but the enactment, that all persons who should act as brokers should be admitted by the court of mayor and aldermen under such restrictions and limitations for their honest and good behaviour as the Court should think fit and reasonable, shews clearly that the legislature had in view, as one object, the benefit and security of the public in those important transactions which are negociated by brokers. The clause, therefore, which imposes a penalty, must be taken (in the language of Lord *Holt*, above referred to) to imply a prohibition of all unadmitted persons to act as brokers, and consequently to prohibit, by necessary inference, all contracts which such persons make for compensation to themselves for so acting: and this is the contract on which this action (so far as it relates to brokerage) is brought.

This provision of the statute, so construed, is in affirmance of the right of the mayor and aldermen to admit brokers, which appears to have existed in the earliest times, and that for the convenience of trade and the public good, as may be collected from the statute 13 Ed. 1, st. 5, and the recitals in the 1 Jac. 1, c. 21, and in the 8 & 9 W. 3, c. 32.

The distinction between this and the case of *Exparte Dyster* (*z*), which was cited on behalf of the plaintiff, is very clearly explained by Lord *Eldon* in his judgment. The prohibition to act without admission is statutory; the regulations adopted by the mayor and court of aldermen in the case of admitted brokers, are not; they are purely municipal, and have not the force of a general law: the only consequences of their violation are those which the regulations prescribe.

One other case cited for the plaintiff remains to be noticed; it is that of *Gremaire* v. *Le Clerc Bois Valon* (*a*), in which Lord *Ellenborough* held, that the plaintiff could recover for surgery and medicines, though he had not been admitted pursuant to the statute 3 Hen. 8, c. 11, s. 1. It is certainly difficult to reconcile this case with the rule above laid down, for the provisions of that statute were clearly meant to secure to the public skilful practitioners in surgery and medicine; but, on a motion for a new trial, the Court of King's Bench do not appear to have sanctioned the doctrine of Lord *Ellenborough*, for they disposed of the case on another ground, namely, that there was no proof that the plaintiff had *not* been duly licensed. We therefore think that case is not a binding authority, and, for the reasons above given, are of opinion that the rule must be discharged.

Rule discharged.

(*z*) 2 Rose's Bankrupt cases, 349.

(*a*) 2 Campb. 144.

PROBERT *v.* PHILLIPS and others.

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ASSUMPSIT for work and labour, goods sold, &c., money had and received, and account stated.

Pleas.—1st. Except as to —*l.*, non-assumpsit. 2d. As to —*l.*, payment. 3d. As to —*l.* that the work was done under a special contract, which the plaintiff broke, and defendants thereby sustained damage to the aforesaid amount. 4th. As to —*l.*, set-off. 5th. Payment into court of —*l.* The cause was referred, and the arbitrator directed a verdict to be entered for the plaintiff, on the general issue, for 75*l.*, but on the latter pleas for the defendants: the entire amount of the verdict for the defendants was 77*l.* The postea was delivered to the defendants' attorney.

Greaves moved for a rule to show cause why the postea should not be delivered to the plaintiff's attorney, on the ground that the plaintiff was entitled to the general costs of the cause, as the verdict of the general issue was found in his favour; he cited *Broodbent* v. *Shaw* (*a*) as an authority, that where a plaintiff is forced to take the cause to trial, by the defendant pleading the general issue, which is found in favour of the plaintiff, he is entitled to the general costs of the cause.

Where the entire amount of the issues found in favour of the defendant exceeds that found for the plaintiff, the defendant is entitled to the general costs of the cause, even though the general issue be found in favour of the plaintiff provided the pleas are pleaded to separate parts of the plaintiff's demand.

PARKE, B.—Where there is a new assignment, the case is different; but here the pleas are pleaded separately to distinct parts of the plaintiff's demand and cover the whole of it.

Rule refused.

(*a*) 2 B. & Adol. 940.

GURNEY and others, executors of THOMAS SOWDON, deceased, *v.* RAWLINGS and others.

COVENANT on a policy of insurance. The declaration stated, that whereas theretofore, to wit, on the 9th *November*, 1827, by a certain instrument or policy of insurance then made *(profert in curiam,)* it was witnessed that *Thomas Sowdon*, of *Whitstone*, near *Exeter*, in the county of *Devon*, signed a declaration to the *Eagle Insurance Company*, bearing date the 9th day of *November*, 1827, wherein, among other circumstances, it was stated that on that day the age of the said *Thomas Sowdon* did not exceed forty-six years, and that the said *Thomas Sowdon* had paid to the said company, the sum of 21*l.* 11*s.* 8*d.* as a consideration for the insurance of the sum under mentioned, on his life, for one year, from the 9th day of *November*, 1827, and had agreed to pay the like sum, whether the assured were in health or not, on the 9th day of *November* in each succeeding year during his life; and by the said instrument or policy of assurance, it was further witnessed, that the defendants, three of the directors of the said company, did order, direct, and appoint, that if the said *Thomas Sowdon* should depart this life, at any time within the said

A life policy under seal is bona notabilia where the instrument actually is at the time of the death of the party insured as it amounts to a specialty debt.

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term of one year, or any time within the years which should follow, provided such payments, as aforesaid, should have been duly made, the capital, stock, and funds of the said company should stand charged and be liable to pay to the executors, administrators, or assigns of the said *Thomas Sowdon*, within three calendar months after his decease should have been duly certified to the directors of the said company, the full sum of 500*l.* The declaration then set forth the usual provisoes and conditions, on which alone the policy should be valid, and averred performance of them all. It then averred, that *Thomas Sowdon* was dead, and assigned as a breach, the non-payment of the said sum of 500*l.* within three calendar months after the said decease of the said *Thomas Sowdon*, had been certified to their directors as aforesaid, or at any time afterwards. Profert was then made of the said letters testamentary.

Second plea.—That before and at the death of the said *T. Sowdon*, and the proving of the said will, and of the granting of the said letters testamentary, produced in court, the defendants were, and still are, resident and commorant in the city of *London*, and that the whole of the capital, stock, and funds of the said company, in the said policy mentioned, were, before and at the time of the death of the said *T. Sowdon*, and at the time of proving the said will, and of granting of the said letters testamentary, produced in court, and from thence hitherto have been and still are situated, placed, located, and fixed within the said city of *London*; and the said defendants say, that the said city of *London*, during all the time aforesaid, was and is without the diocese of *Exeter*, and within the diocese of *London*, by reason of which said several premises the proving the said will and the granting of the said letters testamentary, as far as relates to the said policy of assurance, did not in any wise belong or appertain to the said Bishop of *Exeter;* and the said letters testamentary produced in court are thereby void and of no effect against the said defendants in respect of the said sum of 500*l.* and of all money due upon or by virtue of the said policy of assurance, and this the defendants are ready to verify, &c.

Replication:—That the said *T. Sowdon*, up to and at the time of his death, dwelt and was resident and commorant within the diocese of *Exeter* aforesaid, to wit, at *Whitstone*, and there within the diocese of *Exeter* aforesaid, died; and that the said instrument or policy of assurance, in the said declaration above mentioned, was at the time of the death of the said *T. Sowdon*, within the diocese of *Exeter* aforesaid, and not elsewhere, and this the plaintiffs are ready to verify, &c.

Demurrer and Joinder in demurrer.

Wightman, in support of the demurrer. Unless this money was *bona notabilia* within the diocese of *Exeter*, the letters testamentary are either void, or at all events voidable. This is, in fact, a specialty, charging the effects of the defendants, which are situate in the diocese of *London*, and there should have been a prerogative probate; it is like the case of a lease of lands; Com. Dig. Admor. B. This cannot be considered either as a simple contract debt which is *bona notabilia*, at the place the debtor was living, at the time of the creditor's death, nor yet as the common case of a specialty debt, which is *bona notabilia* wherever the specialty itself lies at the death of the creditor. Bacon's Abrid. Exors. & Admors. E. [*Parke*, B. This is nothing more than a cove-

nant, which is a specialty debt. If it be not a covenant, how could an action be maintained upon it?

G. T, White, contrà, was stopped by the Court.

Lord ABINGER.—If this policy has any legal effect, the defendants are personally liable on their covenant: they have undertaken to pay a given sum of money if their funds prove adequate.

PARKE, B., ALDERSON, B., and GURNEY, B., concurred.

Judgment for the plaintiffs.

MORANT *v.* SIGN.

A plea giving express colour in trover is good under the new rules.

TROVER. The declaration stated, that the plaintiff was lawfully possessed as of his own property, of certain goods and chattels, to wit, one oak tree, one piece of timber, two cart-loads of bushes, and five hundred-weight of bark, which he casually lost, &c.

Plea—That before the said time when, &c., to wit, on, &c., he, the defendant was seised in his demesne as of fee, of and in a certain close called *Colehager*, situate, &c., abutting, toward the north, on a certain other close of the defendant, called *Smith's Meadow*, towards the east, on a certain fence separating the first-mentioned close from a certain close called *Mill Mead*, and towards the south on a certain bank of a certain mill-stream; and being so seised, he, the defendant, on the day and year last aforesaid, cut down one oak-tree, one other tree, and two cart loads of bushes, then respectively growing and being in and upon the said first mentioned close, and then cut and stripped from the said other tree five cwt. of bark, which oak tree, bushes, and bark, and which other tree so stripped of its bark as aforesaid, are the same goods and chattels in the said declaration mentioned. And the defendant further says, that afterwards, and before the said time when, &c., to wit, on the day and year last aforesaid, he, the defendant, delivered the said goods and chattels to one *Richard Roe*, to be kept by the said *Richard Roe* to and for the use of him the defendant, and the said *Richard Roe*, afterwards, and before the said time when, &c., to wit, on the day and year last aforsaid, delivered the said goods and chattels to the plaintiff, whereupon the defendant, at the said time when, &c., took the said goods and chattels from and out of the possession of the plaintiff as he lawfully might do, for the cause aforesaid, which is the same conversion and disposition in the said declaration mentioned. And this the defendant is ready to verify, &c.

Demurrer, assigning the following causes:—That the plea, in effect, amounts to a denial of right of property in the plaintiff of the goods and chattels in the declaration mentioned, and ought to have been so pleaded in form, and to have concluded to the country; that the statement in the said plea respecting the conversion of the said goods and chattels, cannot be put in issue by the plaintiff; that the facts disclosed by the plea, are not inconsistent

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with the right of property of the said goods and chattels being in the plaintiff, at the time of the conversion thereof, as stated in the plea; and that the said plea does not sufficiently or properly confess and avoid.

Barstow, in support of the demurrer.—At common law, this plea would clearly have been bad before the new rules; unless, therefore, there is something in them to make it good, this demurrer must be allowed. Now the new rules say, that, "in an action on the case, the plea of not guilty shall operate as a denial only, of the breach of duty or wrongful act, alleged to have been committed by the defendant, and not of the facts stated in the inducement." Thus not guilty, in trover, operates as a denial of the conversion only. It is a mere attempt by the defendant to obtain the advantage of the affirmative of the issue. This is the first case in which express colour has been given in trover. [*Parke*, B.—I see nothing in the new rules to prevent giving colour.] Actions on the case are put on the same footing as assumpsit; and there express colour is never given.

Per Curiam.—There can be no doubt that this plea is good under the new rules, whatever it might have been previously.

Barstow prayed leave to amend.

Leave to withdraw demurrer and reply, on payment of costs.

Manning was to have supported the plea.

M'GAHEY *v.* ALSTON and SEWELL.

Proof of acting as a public officer is *prima facie* evidence of his being legally appointed.

It is for the Court to decide under the facts of each particular case, what is such reasonable search for a lost document as to make secondary evidence of its contents admissible.

DEBT on bond given by the defendants to the directors of the poor of the parish of *St. Pancras* and their successors, conditioned for the due performance of his duties as paying clerk, by *Alston* the defendant, and for his accounting for all monies received by him in the execution of his office. *Pleas.*—1st. That *M'Gahey* was not the vestry clerk of the parish of *St. Pancras*, or entitled to sue in behalf of the directors. 2d. Performance, generally, by the defendant *Alston*. The third special plea was demurred to, and upon argument, judgment was given for the plaintiff in *Easter* term last. The replication took issue on the two first pleas, and assigned for breach, that *Alston*, whilst he was such paying clerk, had retained in his hands the sum of 34*l.* 5*s.* against the will of the directors.

At the trial, before *Gurney*, B., at the sittings in last *Trinity* term, it appeared that a Mr. *Scadding* had been appointed vestry clerk, at a salary of 500*l.* a-year, and the defendant *Alston* was appointed paying clerk. Mr. *Scadding* having resigned his office, the directors of the poor passed a resolution, on the 15th of *July*, 1835, that *Alston* should be appointed vestry clerk *pro tempore*. On the 29th of *July* following, the vestry adopted this resolution, but passed a resolution diminishing the salary from 500*l.* to 300*l.* per annum. *Alston* was afterwards removed from his office of vestry clerk, and he claimed his salary after the rate of 500*l.* per annum; and it appeared that, having money of the parish in his hands, he retained the sum of 71*l.* 15*s.*, of

which it was not disputed that he was entitled to 37*l.* 10*s.*, but the question arose as to his title to 34*l.* 5*s.*, which was the difference of salary when calculated at 300*l.* per annum. On *Alston*'s dismissal from office, he submitted his accounts to a committee of the vestry, in which he had made an entry of his retainer of the 34*l.* 5*s.*, which was examined by them, and the following entry was made at the foot—"Read and allowed. *J. Bradley*, Chairman." This item was afterwards disallowed by the auditors, and finally by the vestry. To prove the first issue, *M'Gahey*, the plaintiff, was called, who stated that he had acted in the office of vestry clerk. It was objected that this was not evidence, and that his appointment ought to be produced; but the learned baron overruled the objection. On the second issue, Mr. *Bradley*, the chairman of the committee who had made the above entry, was called, and he stated that the item of 34*l.* 5*s.* was not ticked off as finally allowed by the committee, but that the objection to it was reserved. This evidence was also objected to, but received by the learned baron, who directed the jury to find whether or not *Alston* had retained any money that had come to him in the execution of his office, and stated that he thought he was not entitled to salary at the higher rate.

It also appeared by *Alston*'s accounts that he had received various sums of money, which had not been satisfactorily accounted for by him. *M'Gahey* proved that a check for 230*l.* was given to the defendant *Alston*, who was at that time paying clerk for the parish, and one of the banker's clerks proved the payment of a check of that amount, on account of vestry, on the same day, and also the custom of the bankers to return all checks, when paid and cancelled, to the paying clerk, whose duty it was to keep them in his office in the workhouse. It was further proved, that application was made to the paying clerk who succeeded *Alston* for an inspection of the cancelled checks, and he accordingly handed to the applicant several bundles of checks, but the one in question was not among them. No notice to produce this check had been given, nor was the paying clerk himself called. Secondary evidence of the check was admitted.

The verdict having passed for the plaintiff,

Sir *W. W. Follett*, in the same term, moved for a new trial on the part of *Alston*.—First there was not sufficient evidence on the first issue to prove that the plaintiff was vestry clerk. The fact of his being vestry clerk was the very foundation of the action; it therefore should have been formally proved. [*Parke*, B.—Is not his acting in the office *primâ facie* evidence? In *Cannell* v. *Curtis* (*a*), there is a dictum of *Tindal*, C. J., that proof of acting in a public office is sufficient *primâ facie* evidence of his filling that office.] The distinction is this: in actions against a public officer, proof of acting in the office is sufficient *primâ facie* evidence; but in actions founded on the fact of being such officer, strict proof must be given. In all cases of slander by attornies or physicians, they are bound to prove strictly their character in which they sue; so likewise the assignees of a bankrupt. In *Cortis* v. *The Kent Water Works Company* (*b*), it was deemed necessary to prove the appointment of the plaintiff, who was the treasurer of a paving act. [*Bolland*, B.—There is a case of *Berriman* v. *Wise* (*c*), which was an act ionof slander, by an attorney,

(*a*) 2 New Cases, 228. (*b*) 7 B. & C. 314. (*c*) 4 T. R. 366.

for words spoken of him in his profession. The Court held, that proof of his acting as an attorney was sufficient. [Lord *Abinger*, C. B.—Suppose he had been irregularly appointed, but had acted with consent of the vestry; could he not have brought the action?] It is apprehended not, as the act requires the appointment to be made in a certain way. Unless he brings himself within the act, the directors have no right to sue in his name. *Sellers* v. *Till* (*d*). The question was much discussed in *Collins* v. *Carnegie* (*e*). The second point is, that Mr. *Bradley*, who was called to prove that his examination of the accounts was not final, was an incompetent witness. He was a director of the poor, and, therefore, in fact, one of the plaintiffs. [*Parke*, B.—He is not a plaintiff on the record, and has no interest. This very point has been decided in *Fletcher* v. *Greenwell* (*f*).] It is submitted, that decision is wrong, for how is the defendant to get his costs? The plaintiff is a mere nominal plaintiff, and is not liable. [*Parke*, B.—The plaintiff is liable for costs, and he must take care and recoupe himself.] In *Whitmore* v. *Wilks* (*g*), Lord *Tenterden* held, that a member of a board like the present, was not a competent witness. Lastly, the issue was not whether *Alston* had retained the money, but whether he had duly accounted. The learned judge, therefore, ought to have put it to the jury whether *Alston* had accounted or not.

PARKE, B.—On the points moved by Sir *William Follett*, I think no good objection has been made. Acting in a public character has always been held *primâ facie* evidence of filling the office in question. On the second point, the decision in *Fletcher* v. *Greenwell*, which I referred to, is precisely in point. On the third point, the issue was, whether there was a balance of 34*l.* 5*s.* in *Alston*'s hands, which he ought to have paid over. Now it is proved that he had received a sum equal to that amount; but he contended, that he had a right to retain it, because, in fact, it was paid to him as his salary; but the directors had no power to pay him more than the vestry authorized, and this payment never was, in point of fact, authorized by the vestry. If the item had been allowed by them, then the question would have arisen, whether *Alston* was entitled to it or not; and even then I think it would not be binding against them, because it would be a payment to a third person by *Alston*, which *Alston* knew he was not entitled to make, that is, on the supposition that he was not entitled to more than 300*l.* a year. But it is not necessary to decide this point, as the accounts were not allowed at all; and the only appearance of its being allowed at all was, in fact, a mistake. I therefore think there should be no rule.

Platt on behalf of the defendant, *Sewell*, who was only a surety for *Alston*, applied for a similar rule, on the ground that there was no sufficient evidence of the receipt of the monies for which *Alston* had not accounted, to make *Sewell* liable as a surety. He cited *Middleton* v. *Melton* (*h*), and *Goss* v. *Watlington* (*i*). The Court granted this rule.

Sir *F. Pollock* and *Peacock* shewed cause. There was sufficient evidence to charge the sureties with the monies received by *Alston*, besides the accounts

(*d*) 4 B. & C. 655.
(*e*) 3 Nev. & Mann. 703.
(*f*) 1 C. M. & R. 754.
(*g*) 1 Mor. & Malk. 214.
(*h*) 10 B. & C. 317; 5 M. & Ryl. 264.
(*i*) 3 B. & B. 132.

rendered by *Alston* himself. A check being once proved to have been delivered to him, and that he received the amount at the banker's, it lies on him to exonerate himself from the liability thus thrown upon him. Although the check itself was not produced, sufficient search was made to let in secondary evidence of its contents. It is for the Court to decide whether reasonable search has not been made. *Bishop of Meath* v. *Marquis of Winchester* (*k*), *Rex* v. *Stourbridge* (*l*). The Court here called on *Platt* to support his rule.

Platt.—The parish chest ought to have been searched, and the paying clerk himself called to satisfy the Court, that every reasonable attempt was made to produce the check if possible: there might have been many more bundles of checks in the parish office, besides those given to the witness for his inspection. In *Gully* v. *Bishop of Exeter* (*m*), the party looked through all the deeds in the attorney's possession.

PARKE, B.—The proper place for this cancelled check to be found, was at the parish office. I think a reasonable search was made there, sufficient to let in secondary evidence; and that evidence was certainly conclusive.

ALDERSON, B.—In *Gully* v. *B. of Exeter, Best*, C. J., says, "The degree of diligence to be used in searching for a deed, must depend on the importance of the deed, and the particular circumstances of each case." There is no reason here to suppose that any thing has been wilfully kept back by the plaintiff. I think the secondary evidence was properly admitted.

Rule discharged.

(*k*) 3 Bing. N. C. 196.
(*l*) 8 B. & Cr. 96.
(*m*) 4 Bing. 298.

EDWARDS, Administrator *v.* GRACE.

ASSUMPSIT for goods sold, &c., and an account stated with the intestate, laying the promise to pay him; the declaration also contained another count for work, &c., by plaintiff, as administrator, with a promise to pay plaintiff, as administrator.

Special demurrer for misjoinder.

A count for work done by the plaintiff as administrator, may be joined with counts for work done by and account stated with the intestate.

Thomas, in support of demurrer.—The money claimed by the last count, if received, could not be assets in the hands of the plaintiff; and it is only on that ground that he could sue in his representative capacity. *Connell* v. *Watts* (*a*), *Ord* v. *Fenwick* (*b*).

PARKE, B.—In *Ord* v. *Fenwick*, Lord *Ellenborough* says, "If one can suppose any case where the money must have been paid by the plaintiff as executrix,

(*a*) 6 East, 405.
(*b*) 3 East, 108.

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EDWARDS v. GRACE.

and for which she must entitle herself to recover as such, the judgment may be sustained." If in any possible case, an executor can be bound to complete his testator's contract, the money, when paid, would be assets. This point is settled by *Marshall* v. *Broadhurst* (*c*).

Judgment for the plaintiff.

(*c*) 1 Cr. & Jer. 403.

BECKE, Assignee of W. ASHTON, an Insolvent, *v.* SMITH.

All assignments made with an intention of petitioning the Insolvent Court are fraudulent and void, within 7 G. 4, c. 57, s. 32, though executed more than three months before the party goes to prison. The intention is, in all cases, a question for the jury.

TROVER for cattle, goods, and chattels, the property of the insolvent.

Pleas—first, not guilty; second, denial of insolvent's property in the goods, &c. At the last summer assizes, at *Northampton*, before *Bolland*, B., it appeared that, in the spring of 1834, the insolvent being indebted to the defendant *Smith*, in the sum of 100*l.*, gave him a bill of sale of all his furniture and effects; the goods were sold for about 50*l.*; the insolvent, immediately on giving this bill, left the place, and did not return until the *March* following, when he went to prison and was duly discharged under the Insolvent Act, the present plaintiff being appointed his assignee. This action was brought to recover the value of the goods, &c., sold by the defendant under the bill of sale, which the plaintiff contended was void under the stat. 7 G. 4, c. 57, s. 32. The learned judge was of opinion, that that section did not apply to this case, as more than three months had elapsed between the execution of the instrument and the party going to prison; the jury found that, independently of the Insolvent Act, there was no fraud in the transaction, and gave a verdict for the defendant.

Humfrey having obtained a rule to shew cause why there should not be a new trial on the ground of misdirection.

Adams, Serjt., and *Whateley*, shewed cause. The question depends upon the construction of the 32nd section of the Insolvent Act. By the express words of that enactment, no assignment, though executed by a party in insolvent circumstances and voluntarily, shall be considered as fraudulent, unless it be made within three months before the party shall go to prison, or if he be actually in prison at the time of entering the assignment; then it must have been done with the intention of petitioning the Court for his discharge. The statute has fixed a limit, and when that period has once elapsed, the instrument cannot be impeached, except on the ground of fraud, which in this case the jury have negatived. Unless the assignor is in prison at the date of the instrument, the lapse of three months is a bar to the claim of the assignee. The ruling of the learned baron was, therefore, correct.

Humfrey, *Waddington*, and *G. T. White*, *contrà*.—It is, in all cases of this nature, a question for the jury, whether the assignment was made with an

intention of taking the benefit of the Insolvent Act. *Wainwright* v. *Miles*(*a*); this point was not submitted to the jury at the trial. If the assignment is executed within three months before the insolvent goes to prison, it is absolutely void; but if executed more than that time before, still, if the intention of the assignor at the time, was to take the benefit of the act, it is equally fraudulent and void; the plaintiff is entitled to have the decision of a jury as to the intention of the insolvent, and the Court will therefore direct a new trial.

Cur. adv. vult.

PARKE, B. now delivered the judgment of the Court.—The only question which remained for consideration, after the argument against the rule for a new trial in this case, was as to the true construction of the 32nd section of the 7 Geo. 4, c. 57. It occurred to my brother *Bolland*, on the trial, that the section applied to such assignments and transfers only as were made within three months before the commencement of the imprisonment, or during its continuance: and the assignment in question having been made more than a year before the insolvent went to prison, he thought that this section could not render it void. The plaintiff is entitled to a new trial, if that view of the subject was incorrect; and upon consideration, we all agree that it was.

It is a very useful rule (*b*), in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.

Let us adopt that rule in this case. The 32nd section enacts, "That if any prisoner, who shall file his or her petition for his or her discharge, under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void, as against the provisional or other assignee or assignees of such prisoner appointed under this act: provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his or her discharge from custody under this act."

By the first part of the clause, every voluntary conveyance to a creditor, by one who afterwards petitions for his discharge, made either before or after his imprisonment, whilst he is in insolvent circumstances, is avoided. Then comes the proviso, by way of qualification of the foregoing provision, which enacts,

(*a*) 3 M. & Sc. 211.
(*b*) Per *Burton* J., in *Warburton* v. *Loveland*, 1 Hudson & Brooke's Irish Reports, 648.

that no such conveyance shall be void, unless made within three months before the commencement of the imprisonment, *or*, with a view of petitioning the Court for his discharge. If *either* of these circumstances occurs, the voluntary conveyance by an insolvent is rendered null; if made within the three months it is void; if made *at any time*, with a view of petitioning the Court, it is void, for there is not a word expressly to confine the last alternative within any limit of time: and though, at first sight, the words, "with a view of petitioning for his discharge," might strike the reader as applying to persons *then* in custody, such is not necessarily their meaning. In reality, they are just as applicable to a person out of prison, as to one in prison. The construction contended for by the plaintiff is, therefore, according to the words of the clause; it is, besides, a very reasonable one. The effect is this. As voluntary preferences are usually given on the eve of taking the benefit of the act, a time is fixed (three months,) within which, to prevent many questions, all voluntary conveyances to a creditor, made when the debtor is in insolvent circumstances, are avoided: *before* that time all such conveyances are avoided, where the actual intent to give a preference to a particular creditor is proved; and thus, the same effect is given to the insolvent as to the bankrupt law, with reference to all anterior transactions.

On the other hand, in order to give to the clause the meaning contended for on the part of the defendant, the grammatical construction must be altered, by introducing some words for the purpose of limiting the operation of the latter alternative: and the clause must be read as if it had been written thus, "Provided that no such assignment, *if made before imprisonment*, shall be void, unless made within three months before, &c., *or if made* after, unless made with a view or intention by the party conveying of petitioning the Court for his discharge." But if this were done, this incongruity would arise, that a stronger case would be required to avoid an assignment made *after* imprisonment than one made before. Besides, if this construction were adopted, every assignment made more than three months before the commencement of the imprisonment would be valid, however clear the intention to give a preference might be; and thus the whole object of the act might be defeated by a fraudulent insolvent, who, after conveying all his property to favoured creditors, would only have to go out of the way for three months, and then take the benefit of the act, after which no one assignment of his property could be questioned on the ground of fraudulent preference.

It appears to us, therefore, that the true construction of the clause is, that every voluntary assignment, made by one in insolvent circumstances, is void, *whenever made* with intention to take the benefit of the act. And this was the clear opinion of the Court of Common Pleas in the case of *Wainwright* v. *Miles* (*c*), though the point was not fully argued. It is true that, upon the plaintiff's view of the case, in order to give full effect to the intention of the legislature, and to embrace *all* cases of voluntary transfers, both before and *after* imprisonment, the language of the clause (not very accurately drawn) must in one respect be understood, not accordlng to its strict sense: and the words "within three months before the commencement of the imprisonment," which, strictly construed, exclude the time of imprisonment, must be read so as to include it, and taken to mean "within a period commencing three months

(*c*) 3 Moore & Scott, 211.

before the imprisonment;" otherwise one of the inconveniences above pointed out, as necessarily resulting from the defendant's construction, would follow, namely, that a conveyance *after imprisonment*, though voluntary, would be protected, unless made with a view and intention of petitioning.

To obviate such an incongruity, common to both the constructions, according to the strict grammatical sense, the words must be thus slightly varied.

We are of opinion, for these reasons, that the rule must be made absolute for a new trial, when the question to be submitted to the jury, with reference to this section, will be, whether the assignment was made by the insolvent, when in insolvent circumstances, voluntarily, and with the view and intention by him of petitioning the Insolvent Court for his discharge from custody.

If all these circumstances *concur*, the plaintiff would be entitled to a verdict, but otherwise he would not.

Rule absolute.

DOE d. GEORGE GORD *v.* NEEDS.

EJECTMENT for a house and lands, in the parish of *Burlescombe*, in the county of *Devon*. At the trial, before *Littledale*, J., at *Exeter*, at the last spring assizes, it appeared that the lessor of the plaintiff claimed under the following will of one *John Shark*, who died seized of the premises in question. The will was, in substance, as follows:—

"I give and bequeath unto my two friends, *Richard Corner* and *Henry Bond*, yeomen, all those my freehold lands, tenements, and hereditaments, which I hold in fee-simple, situate, lying, and being in the parish of *Burlescombe*, and county of *Devon*, called or known by the names of *Harris's* and *Moor's Croft*, upon this special trust and confidence in them reposed, and to the intent or purpose that they, the said *Richard Corner* and *Henry Bond*, and the survivors and survivor of them, do and shall permit and suffer my wife, *Mary Spark*, to have, hold, and enjoy the same, and to take to her own use and behoof the rents, issues, and profits thereof during her natural life; and after her decease, upon this further trust and confidence, and to the intent and purpose that the said trustees, or survivors or survivor of them, do and shall, out of the rents, issues, and profits arising out of my said freehold lands and tenements, pay or cause to be paid unto my brother *David Spark*, the yearly sum or annuity of ten pounds for the term of five years, if he should so long life; as also my wearing apparel of every sort. Also, I give and bequeath unto *John Gord* the dwelling-house, called the *Middle House*, and part of the orchard, together with the garden thereto belonging, to hold to him during his natural life, and after his decease to his wife, *Mary Gord*, and after their decease to *John Gord*, the son of *George Gord*, and his assigns. Also, I give and bequeath unto *John Gord* and *Jane Needs* the aforesaid close of land, called *Moor's Croft*, to hold to them during their natural lives as tenants in common, and not as joint tenants; and after their decease to *George Gord*, the son of *George Gord*, and to his heirs. Also I give and bequeath unto *Jane Needs* the dwelling-house

Where a testator devised an estate in fee to *George G.*, the son of *George G.*, and another estate to *George G.* the son of *G.*; and also, gave a legacy to *George G.*, the son of *John G.*; and another legacy to *George G.*, the son of the said *George G.* *Held*, that evidence was admissible to shew who the testator intended by *George G.* the son of *G.*

If an objection is made at *nisi prius*, that the legal estate is in trustees, in respect of a devise to them in fee; and it afterwards appeared, that the trustees only took a chattel interest under the will; the objection cannot be supported in the Court above, that the legal estate is still in the trustees, because if the objection had been made at *nisi prius*, that the trustees' estate was derived from a chattel interest, it might have been shewn that the chattel interest had expired.

Exchequer.

DOE d. GORD v. NEEDS.

wherein I now reside, together with the pound-house, garden, and other appurtenances thereunto belonging, to hold to her during her natural life; and after her decease to her daughter *Ann Needs*, and her assigns. Also I give and bequeath unto *Anne Needs*, until the decease of *George Needs* and *Jane Needs*, the lower house and garden; and after their decease to *George Gord*, the son of *G. Gord*, and his assigns. Also I give and bequeath unto *George Gord*, the son of *John Gord*, the sum of ten pounds, and to *Jane* and *Elizabeth*, the two daughters of the said *John Gord*, the sum of five pounds each. Also I give and bequeath unto *Mary Gord*, the daughter of *George Gord*, the sum of five pounds, and to *George Gord*, the son of the said *George Gord*, the sum of ten pounds, and to *John Gord*, one other son of the said *George Gord*, the sum of twenty pounds. Also I give and bequeath unto *George Needs*, the son of *George Needs*, the sum of ten pounds. All which said legacies to each of them given, I order, will, and direct shall be paid them respectively by my trustees, or survivors or survivor of them, when they come to the age of twenty-one years; and if either of the children of *John Gord*, *George Gord*, or *George Needs*, happen to die before the legacies herein and hereby to them given, the share of he, she, or they so dying shall remain in the surviving brothers and sisters, share and part alike. And it is my will and meaning that my said trustees, or either of them, shall not be liable to answer or make good any loss or losses that shall or may happen in consequence of this my will. And, lastly, I do hereby nominate, constitute, and appoint my said wife, *Mary Spark*, to be sole executrix of this my last will and testament."

This will was dated 21st *March*, 1807, and the testator died in *January*, 1812, without having revoked or altered it. The widow *Mary Shark*, and the devisees *Jane Needs*, *George Needs*, and *Qwen Needs*, were dead before the commencement of the action. The lessor of the plaintiff offered declarations of the testator in evidence, to shew that he was the person intended to be designated in the will as *George Gord*, the son of *Gord*; this evidence was objected to, but the learned judge overruled the objection. It was also objected for the defendant, that the estate in fee was in the trustees, and therefore, that the plaintiff could not recover. The learned judge reserved the point, and the verdict passed for the plaintiff.

Ball, in *Easter* term, having obtained a rule for a new trial on the first point, and for a nonsuit on the latter point,

Bompas, Serjt., and *Moody*, shewed cause against this rule in *Trinity* term. The trustees in this case had not an estate of inheritance; all the purposes of the trusts might have been performed by a less estate; they, therefore, only had a chattel interest. *Doe* v. *Simpson* (*a*), *Doe* d. *Player* v. *Nicholls* (*b*). [*Parke*, B.—There is a difficulty about that part of the case, because if they took only a chattel interest, still the legal estate is in them until the trusts are executed.] That point was not taken at the trial, and therefore cannot be insisted on here. It might have been shewn that all the trusts were executed, in which case the legal estate would vest in the lessor of the plaintiff. On the second point, it is submitted that evidence was admissible to shew which of the two *George Gords* was intended by the testator. This is a case not of patent but latent ambiguity. The devise to *George Gord*, the son of *Gord*,

(*a*) 5 East, 162. (*b*) 1 B. & C. 336.

upon the face of it is good; it is only the adducing evidence that makes it ambiguous; evidence, therefore, may be brought to clear up the doubts. It is fallacy, perhaps, to call it ambiguity; it is more properly an obscurity in language, which may always be cleared up by evidence to shew what the intention of the testator is. Where a description in a will fits two objects, the rule of construction is, that evidence may be admitted to shew which object the testator intended. *Miller* v. *Travers* (*c*). It does not appear on the face of the will that *George Gord*, son of *Gord*, means either *George Gord*, the father or the son; there is no ambiguity, therefore, on the face of the will. The cases shew that if the testator had given instructions to insert one name and others were inserted by mistake, evidence is admissible to shew the intention of the testator. *Beaumont* v. *Fell* (*d*), Lord *Cheyney's* case (*e*), *Abbott* v. *Massie* (*f*), and *Hodgson* v. *Hodgson* (*g*), *Steele* v. *Hoste* (*h*), *Price* v. *Page* (*i*), comprise this point. [*Parke*, B.—The words of a devise of lands cannot be altered since the Statute of Frauds, which requires a will to be in writing.] In *Marten* v. *Marten* (*k*), where the name of a legatee was falsely spelt, the master of the rolls referred it to the master to see who the testator intended. *Careless* v. *Careless* (*l*) is quite in point with the present case. [*Alderson*, B.—All these cases are collected in *Doe* v. *Chichester* (*m*), and in Mr. *Wigram's* very valuable book on evidence.]

Ball, contrd.—The point taken at the trial as to the legal estate, was founded on *Doe* v. *Nicholl* (*n*); it is, therefore, open to contend, that the trustees had the legal estate in them, whether that estate was in fee or a chattel interest only. [*Parke*, B.—It appears by the learned judge's notes, that the only point taken was, that the estate in fee was in the trustees; if it had been put that this estate was only a chattel interest, as we think it was, if that point had been made at *nisi prius*, it might have been cleared up, and have been shewn that the trusts were executed.] As to the evidence, the rule is, "if on the face of the will, it seems to be so ambiguous as to be incapable of any certain application, it is void in point of law" (*o*). That is the case with this will; if evidence be admitted to give the devise to either of the *Geerge Gords*, it is the decision of the Court and not the testator that makes the devise. Looking at the terms of the will alone, it is impossible to say which *George* was intended. If parol evidence is to be admitted, it makes a devise of land good without writing. In *Price* v. *Page*, there was no decision of the Court. The distinction between the cases cited in favour of the admission of evidence and this case is, that here the ambiguity arises on the face of the will itself; it is created by the testator, and, therefore, the will is uncertain and cannot be helped by evidence. This distinction was pointed out by *Patteson*, J., in *Doe* d. *Preedy* v. *Holton* (*p*). "In every case extrinsic evidence must be received for the purpose of shewing the state of the property, so as to see what comes within the clear terms of the devise; but not to clear up any difficulty arising in the will itself." There is no express decision on this point, but *Castledon* v. *Turner* (*q*), decides that an omission of a name cannot be supplied

(*e*) 8 Bingh. 244.
(*d*) P. Wms. 140.
(*e*) 15 Rich. 68.
(*f*) 4 Ves. 148.
(*g*) 2 Vern. 593.
(*h*) 6 Mad. 192.
(*i*) 4 Ves. jun. 680.
(*k*) 1 P. Wms. 421.
(*l*) 1 Mer. 384.
(*m*) 3 Taunt. 147.
(*n*) 1 B. & C.
(*o*) 2 Starkie's Ev. 925.
(*p*) 5 Nev. & Mann. 391.
(*q*) 3 Atk. 259.

Exchequer.

DOE d. GORD v. NEEDS.

by evidence; and in *Baylis* v. *The Attorney-General*(r), Lord *Hardwick*, C., would not allow of evidence to explain the testator's intention where there is a blank.

PARKE, B.—The difficulty in this case is, that there are two persons objects of the testator's bounty, and he has not afforded us means of ascertaining which he intended. My present impression certainly is, that it is a patent ambiguity. As to the first objection, it does not appear to have been objected that the trustees had the legal estate, in respect of the chattel interest, which I think they took, but in respect of an estate in fee. If the objection had been made in the proper shape, it might have been shewn, at the trial, that that chattel interest had expired, and therefore that the estate was out of the trustees.

On the other point, we will take time to consider.

Cur. adv. vult.

In this term the judgment of the Court was delivered by—

PARKE, B.—In this case, which was heard before my brothers *Bolland*, *Alderson*, *Gurney*, and myself, a rule *nisi* for a new trial was obtained on two grounds:—first, that upon the true construction of the will of *John Spark*, under whom the lessor of the plaintiff claims, the legal estate in the land in question was not in the plaintiffs, but in the trustees; and secondly, that evidence of the devisor's declarations was improperly received on the trial, to shew what he meant by a particular description in the will.

The substance of the will was as follows. [His Lordship stated the provisions of the will set forth above.] Upon shewing cause against the rule *nisi* for a new trial, it was contended, on the part of the lessor of the plaintiff, that the trustees took only a chattel interest, till the annuity and legacies were paid, and these having been satisfied, the legal estate of the trustees ceased; and the case of *Doe* d. *White* v. *Simpson* (s), and the authorities there cited, were referred to in support of the proposition; and the first objection on the part of the defendants was no further insisted upon. The only point therefore remaining to be considered is, whether evidence was properly admitted of the devisor's declarations to shew what person he meant to designate by the description of "*George Gord*, the son of *Gord*." And we are of opinion that such evidence was properly admitted.

If, upon the face of the devise, it had been uncertain whether the devisor had selected a particular object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual: such would have been a case of *ambiguitas patens*, within the meaning of Lord Bacon's rule(t), which ambiguity could not be holpen by averment; for to allow such evidence would be, with respect to that subject, to cause a parol will to operate as a written one; or, adopting the language of Lord Bacon, "to make that pass without writing, which the law appointeth shall not pass but by writing." But here, on the face of the devise, no such doubt arises. There is no *blank* before the name of *Gord* the father, which might have occasioned a doubt whether the devisor had finally fixed on any *certain* person in his mind. The devisor has clearly selected a particular individual as the devisee. Let us then consider, what would have been the case, if there had been no mention in the will of any *other George Gord*, the son of a *Gord:* on that supposition there is no doubt, upon the authorities, but that evidence of the devisor's intention, as

(r) 2 Atk. 329. (s) 5 East, 162. (t) Maxims, 25.

proved by his declarations, would have been admissible. Upon the proof of extrinsic facts, which is always allowed in order to enable the Court to place itself in the situation of the devisor, and to construe his will, it would have appeared that there were at the date of the will *two* persons, to each of whom the description would be equally applicable. This clearly resembles the case put by Lord *Bacon* of a *latent* ambiguity, as where one grants his manor of S. to J. F. and his heirs, and the truth is that he has the manors both of North S. and South S.; in which case Lord *Bacon* says, "it shall be holpen by averment, whether of them was that which the party intended to pass."

The case is also exactly like that mentioned by Lord *Coke* in *Altham's* case (*u*); "if A. levies a fine to *William* his son, and A. has two sons named *William*, the averment that *it was his intent* to levy the fine to the younger is good, and *stands well with the words of the fine.*" Another case is put in *Counden* v. *Clarke* (*x*), which is in point; "if one devise to his son *John*, where he has two sons of that name:" and the same rule was acted upon in the recent case of *Doe* v. *Morgan* (*y*).

The characteristic of all these cases is, that the words of the will *do* describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever: it only enables the Court to reject one of the subjects, or objects, to which the description in the will applies; and to determine which of the two the devisor understood to be signified by the description which he used in the will. This subject has been most ably discussed by Mr. *Wigram*, in his excellent treatise on the rules of law respecting the admission of extrinsic evidence in the interpretation of wills.

There would then have been no doubt whatever of the admissibility of evidence of the devisor's intention, if the devise to "*George*, the son of *Gord*," had stood alone, and no mention had been made in the will of *George* the son of *John Gord*, and *George* the son of *George Gord*. But does the circumstance that there are two persons named in the will, each answering the description of "*George*, the son of *Gord*," prevent the application of this rule? We are of opinion that it does not. In truth, the mention of persons by those descriptions in other parts of the will, has no more effect, for this purpose, than proof by extrinsic evidence of the existence of such persons, and that they were known to the devisor, would have had: it shews that there were two persons, to either of whom the description in question would be applicable, and that such two persons were both known: and the present case really amounts to no more than this, that the person to whom the imperfect description appears on the parol evidence to apply, is described in other parts of the same will by a more full and perfect description, which excludes any other object than himself. Still he is pointed out in the devise itself by a description, which, so far as it goes, is perfectly correct. In the case of *Doe* v. *Morgan*, above referred to, precisely the same circumstance occurred.

We are therefore of opinion, that the lessor of the plaintiff is entitled to recover; and the rule must be discharged.

Rule discharged.

(*u*) 8 Rep. 155 a. (*x*) Hob. 32. (*y*) 1 C. & M. 235.

END OF MICHAELMAS TERM.

A

DIGEST

OF THE

CASES REPORTED IN THIS VOLUME;

CONTAINING

THE DECISIONS OF THE COURT OF EXCHEQUER,

FROM

EASTER TERM, 1836, TO MICHAELMAS TERM, 1836, INCLUSIVE.

ACCORD AND SATISFACTION.

An action cannot be maintained upon an agreement which is a mere unexecuted accord of a previous debt. *Reeves* v. *Hearne*, 4.

ACTION.

See ACCORD AND SATISFACTION, 1.
AGREEMENT. SHERIFF, 4.

1. In an action on a contract, by which the defendant admitted a receipt of 40*l.* in part payment of a piano-forte which he undertook to deliver to the plaintiff on his return to *England*, the defendant pleaded that he did deliver a piano-forte, and allow the sum of 40*l.* as part payment thereof:—*Held*, that the lapse of upwards of twenty years from the time of the making of the contract was not a *primâ facie* proof of the plea. *Siboni* v. *Kirkman*, 51.

2. *Held* also, that the executor of the defendant was liable on the contract. *Id.*

3. A party who has, at the time a debt is contracted, given a verbal guarantee in the presence of the debtor, has an authority from him to pay the debt, and, having done so, may recover the amount as money paid to his use. *Dict. aliter*, if there was not evidence that the verbal guarantee was given with the debtor's consent. *Alexander* v. *Vane*, 57.

4. In an action for work and labour, the plaintiff proved a service of 161 days. The particulars of demand claimed payment "at the rate of 200*l.* a-year." Payment had been made in different sums and at various periods. At the expiration of the 161 days, the plaintiff left the defendant's service. It did not appear that he had offered or had been requested to return. The plaintiff had a verdict. *Semble*, that there was no evidence of a hiring at all, or that, if there was, the evidence raised a presumption that the hiring was not for a year; and *held*, that in the absence of a finding by a jury that there was a yearly contract, the Court ought not to grant a new trial, on the ground that there appeared to be an unperformed contract for a time certain. *Bayley* v. *Reinnell*, 60.

AFFIDAVIT.

See PRACTICE, I.

AGENT.

See PARTNER.

1. A. the brother of the defendant, acted as his shopman, and had authority to order in goods for the shop. A. was indebted to the plaintiff in 11*l.*, and on being pressed for payment offered a bill of exchange, drawn and accepted by C. and D., and which bore the indorsement of the defendant. The bill being for 25*l.* he desired that goods to make up the balance should be sent to the defendant's shop. In an action on the bill and for goods sold, against the defendant, it appeared that the defendant's indorsement was not made by him or with his authority:—*Held*, that as it appeared by the evidence that the goods were not furnished on the credit of the bill alone, but on the credit of the defendant also, the plaintiffs were entitled to recover on the count for goods sold. *Rose* v. *Edwards*, 123.

2. A demise was made by the lessor of the plaintiff, and by the terms of the demise the land was to be forfeited on a certain event. Subsequently to the occurrence of the event stipulated against, the son of the lessor of the plaintiff who

had acted as his agent, and by whose instructions an ejectment was brought for the forfeiture, demanded the rent:—*Held*, that there was not sufficient evidence of the son's authority to waive the forfeiture. *Doe* d. *Nash* v. *Birch*, 26.

3. Where a factor sold goods to A., and made out the invoice in his own name, but at the same time disclosed that they belonged to a principal in *London;* and it appeared that the custom of trade was for the factor to sell in his own name when he was under advances to his principal, as he was in the present instance:—*Held*, that A. was entitled to set off a debt due from the factor, in an action brought against him by the principal for the price of the goods. *Warner* v. *M'Kay*, 86.

AGREEMENT.

See ACCORD AND SATISFACTION. BILL OF EXCHANGE, 2.

A building agreement stipulated that the builder, for every week beyond the time stipulated for the performance of the work, should forfeit the sum of 5*l.* weekly, such penalty or forfeiture to be deducted from the amount which might remain owing on the completion of the work:—*Held*, that the other party was not bound to deduct the forfeiture, but that he might maintain an action for it, or make it a subject of general set-off against the builder. *Duckworth* v. *Alison*, 11.

AMENDMENT.

See PRACTICE, 32.

ARBITRATION.

See STAMP.

1. Where all matters in difference were referred, but no question of liability was to be raised, the Court, upon affidavits shewing that the arbitrator could not have awarded the amount stated in his award to be due from defendant to plaintiff, except by rejecting a class of items, set aside the award, although nothing appeared on the face of it. *Harris* v. *Thomas*, 197.

2. An action respecting a right of way was referred, by order of *Nisi Prius*, to an arbitrator, who was to direct what should be done between the parties. He ordered the plaintiff to put up a stile on a piece of land belonging to C., who was not a party to the submission:—*Held*, void. *Turner* v. *Swainson*, 133.

3. The Court will not grant an attachment for non-performance of an award, where the reference was to two, with power to appoint a third arbitrator, they or any *two of them* being authorized to enlarge the time, and the two original arbitrators enlarged the time for making the award before they had appointed the third. *Reade* v. *Dutton*, 228.

4. *Semble*, where a cause is referred, a verdict being taken subject to the certificate of an arbitrator, that it is no objection to the certificate that it was made after the time of the return of the jury process. *Salter* v. *Yates*, 224.

ARREST.

See PRACTICE, 1, 2, 3, 4. COSTS, 1, 2. SHERIFF, 2, 3.

A defendant, in support of an application to be discharged out of custody, on the ground of privilege, in an affidavit stated, that, having several cases to attend in the Courts of C. P. and Exch., he was proceeding through the city on his way to *Westminster*, and when at the Bank of *England*, the recollection of some business with a client whom he was likely to meet at the Auction Mart, he went there, and saw the party, and as he was leaving him to proceed to *Westminster*, he was arrested. The affidavits in answer stated that he was arrested between the hours of two and three, P. M., in the Auction Mart Coffee House; that he then said nothing about going to *Westminster;* and that he said he was there to negotiate a loan, with which he intended to pay plaintiff. *Held*, that these facts did not shew a case of privilege. *Strong* v. *Dickenson*, 83.

ASSUMPSIT.

See PLEADING.

Declaration stated that plaintiff paid money to defendant in *London*, that he might cause it to be repaid to him at *Northampton* on a certain day; that defendant received the money, and in consideration of premises, promised to cause the money to be paid to the plaintiff at *Northampton*:—*Held*, to disclose a sufficient consideration. *Shillibeer* v. *Glyn*, 212.

ATTACHMENT.

See ARBITRATION, 3. PRACTICE, 5.

A demand of the costs in the cause by the plaintiff's attorney, is sufficient to obtain an attachment, although the master's *allocatur* does not direct them to be paid to him. *Cox* v. *Salmon*, 220.

ATTORNEY.

See EVIDENCE, 1, 2, 3. PRACTICE, 7, 22.

1. A plaintiff's attorney wrote a letter demanding a debt and 6*s.* 8*d.* for charges, and stating that if the same were not paid at his office before a certain time, proceedings would be

taken:—*Held, Parke*, B., *dubitante*, that a tender to the clerk at the office before the time, of the debt only, was a good tender. *Kirton* v. *Braithwate*, 48.

2. Where business is done by an attorney for two persons jointly, his bill cannot be referred to the master on the application and undertaking of one of them only. *Hobby* v. *Pritchard*, 214.

3. *Qu.* Whether an action pending on the bill makes any difference. *Id.*

BAIL.

See PRACTICE, II.

BANKRUPT.

See PRACTICE, 18.

1. The assignment of all a trader's estate and effects to one creditor is an act of bankruptcy, without any fraud on the part of the trader. *Siebert* v. *Spooner*, 135.

2. The official assignee in bankruptcy is not within the protection of the stat. 6 Geo. 4, c. 16, s. 44, which limits the time of bringing actions for any thing done in pursuance of the act to three months. *Knight* v. *Turquand*, 187.

3. The application to discharge a prisoner out of custody, on the ground that he had become a bankrupt, and obtained his certificate, must be founded on an affidavit shewing that the certicate was inrolled. *Osborn* v. *Williamscn*, 126.

4. Where an action was commenced ten months after a fiat of bankruptcy was issued against the defendant, and the defendant did not plead his bankruptcy, but gave a cognovit for the debt and costs, and after action brought he obtained his certificate:—*Held*, that he was entitled to his discharge out of custody, as the cognovit did not create a new debt, although it was conditioned for payment at a later date than judgment could have been obtained. *Id.*

BILL OF EXCHANGE.

See EVIDENCE, 11. PLEADING, 4. 14 19. PRACTICE, 4. 21. PROMISSORY NOTE.

1. A notice of dishonour of a bill of exchange is sufficient, if given by a person in whose hands it is, although he does not state where the bill is, or on whose behalf he applies. *Woodthorp* v. *Lawes*, 193.

2. In an action on a bill of exchange, it was held to be an inadmissible defence, that by a contemporaneous parol agreement it was stipulated that payment should not be called for until the determination of another suit, and that that suit was still undetermined. *Adams* v. *Wordley*, 29.

3. The fact that a bill of exchange was accepted for the accommodation of the drawer, is not sufficient to call upon an indorsee to prove that he gave value for it. *Mills* v. *Barber*, 5.

4. A party resident abroad drew a bill, and specially indorsed it to C. to whom he was indebted; he transmitted the bill to his agent, who procured the acceptance of the drawees to the bill, and then gave C. notice that he had received instructions to pay him some money on account of his principal. Before any further communication between these parties, the agent was instructed by his principal not to pay over the bill to C. until his accounts had been investigated. No investigation took place. *Held*, that nothing had passed to make the bill the property of C., and that he could not maintain trover against the agent for it. *Brind* v. *Hampshire*, 33.

BONA NOTABILIA.

A life policy under seal is *bona notabilia* where the instrument actually is at the time of the death of the party insured, as it amounts to a specialty debt. *Gurney* v. *Rawlings*, 235.

BOND.

See PLEADING, 24, 25, 26.

1. Subordinate officers appointed under the St. Pancras Paving Act, have not annual offices; they hold during the pleasure of the vestry; and, therefore, bonds given by them to the directors continue in force after the directors have retired from office. *M'Gahey* v. *Alston*, 46.

2. A bond was conditioned for the due performance by a parochial officer of his duties, "from time to time, and at all times thereafter, during such time as he should continue in his said office, whether by virtue of his aforesaid appointment, or of any re-appointment thereto, or of any such retainer, or employment, by or under the authority, or with the consent or acquiescence of the said trustees, or their successors, to be elected in manner named by the said act." It appeared that by the local act referred to, the office in question was one of annual appointment or election, and it was pleaded to be so:—*Held*, that the bond was not confined to the year for which the officer was appointed, but extended to every year in which he should continue in office by virtue of successive re-appointments. *Quære*, whether it would apply to a case of re-appointment, after having been out of office. *Augero* v. *Keen*, 8.

BROKERS.

See DISTRESS, 3.

A stockbroker, in the city of *London*, cannot recover for work done as a broker, unless duly licensed by the mayor and aldermen of the city of *London*, under the stat. 6 Anne, c. 16. *Cope* v. *Rowlands*, 231.

BUILDING ACT.

The Building Act, 14 Geo. 3, c. 78, s. 43, does not protect a party from an action for a collateral damage, as in darkening lights resulting from a party-wall, erected with a *bonâ fide* intent to pursue the provisions of that act; and, therefore, in an action for such an injury, no notice of action is necessary, nor is it necessary to bring it within three months from the time of the building of the wall. *Wells* v. *Ody*, 12.

BRIBERY.

The corruption of a voter at a municipal election, by promise of an employment, is, under the stat. 5 & 6 Will. 4, c. 76, s. 54, an offence in the party promising. *Harding* v. *Stokes*, 41.

CASE.

Case lies for darkening the plaintiff's windows by a wall erected by the defendant partly on his own lands, and partly on the plaintiff's land. *Wells* v. *Ody*, 12.

CONSTABLE.

See NOTICE OF ACTION.

COSTS.

See ATTACHMENT.

1. To discharge a rule to give costs to a defendant, who has been arrested for a larger sum than the verdict, it is not sufficient to give the Court reasonable ground to believe that the whole sum was due, but it must be shown that the plaintiff had reasonable ground to expect to obtain a verdict for the whole amount. *Lewis* v. *Ashton*, 80.

2. A defendant who had been arrested for 200*l.* on an attorney's bill, applied, after plea pleaded and notice of trial given, to tax the plaintiff's bill, upon which an order was made by consent, that the plaintiff be at liberty to sign judgment immediately, and that the plaintiff's bill of costs be referred to the master to be taxed, the plaintiff undertaking to pay the amount and the costs of the action. On taxation the master disallowed 106*l.*, leaving a balance of 148*l.* odd: 60*l.*, part of the sum disallowed, had been actually expended by the plaintiff according to the defendant's directions:—*Held*, that the plaintiff had reasonable and probable cause for making the arrest, and that the defendant was estopped by the terms of the order from complaining of the arrest. *Watkins* v. *O'Gorman Mahon*, 129.

3. The Court will not allow a defendant to enter a suggestion on the roll to deprive the plaintiff of costs under a Court of Request's Act, and at the same time make the plaintiff pay him the costs of an issue found against him. *Jenks* v. *Taylor*, 90.

4. No suggestion can be entered to deprive a plaintiff of costs, under the *Middlesex* Court of Requests' Act, unless the defendant resides, and the cause of action also arises, within the county. *Bailey* v. *Chitty*, 224.

5. The Middlesex Court of Requests' Act does not apply where the plaintiff's claim is reduced below 40*s.* by a set-off. *Jenkinson* v. *Morton*, 78.

6. In *assumpsit*, a defendant pleaded two special pleas to the whole declaration, except as to a certain sum, and as to that sum he pleaded a payment into Court: the plaintiff took the money out of Court, and replied, admitting that he did not proceed for damages *ultra*, and in his replication he adopted the form of a *nolle prosequi*: —*Held*, that the defendant was entitled to the costs of the special pleas. *Goody* v. *Goldsmith*, 194.

7. Where the entire amount of the issues found in favour of the defendant, exceeds that found for the plaintiff, the defendant is entitled to the general costs of the cause, even though the general issue be found in favour of the plaintiff provided the pleas are pleaded to separate parts of the plaintiff's demand. *Probert* v. *Phillips*, 235.

8. In the King's Bench and Exchequer, it is discretionary with the master to allow the costs of passing the record: in the Common Pleas it may be passed immediately on issue joined. *M'Cune* v. *Smith*, 210.

9. A parish officer, sued in trespass for distraining for poor and highway rates, is not entitled to treble costs in case the plaintiff is nonsuited. *Charrington* v. *Metheringham*, 229.

COURT OF REQUESTS.

See COSTS, 3, 4, 5.

COVENANT.

See LANDLORD AND TENANT.

1. To enable the assignee of a reversioner to sue on the covenants contained in a lease, he must be seised of the same reversion to which the covenants were originally annexed. *Cardwell* v. *Lucas*, 203.

2. A. granted a lease for eleven years, under which defendant entered, but which lease was never executed by A. who died and devised the property to the plaintiff; the plaintiff, as assignee of the reversioner, sued the defendant for breaches of covenants contained in the lease. *Held*, that he could not maintain such action. *Id.*

CROWN.

See PRACTICE, 38, 39, 40.

DAMAGES.

See TRESPASS.

DISCHARGE OF PRISONER.

See BANKRUPT, 3, 4. PRACTICE, V.

DISTRESS.

1. A boat was sent by the owner to certain salt-works belonging to a salt manufacturer, and left a reasonable time in a canal on the premises for the purpose of being loaded with salt:—*Held*, (*Parke*, B. *dissentiente*,) that the boat was not privileged from distress. *Muspratt* v. *Gregory*, 158.

2. Goods of a stranger on the land may be distrained for a rent charge issuing out of it. *Id.*

3. The 57 Geo. 3, c. 93, s. 6, enacts, "that every broker or other person who shall make and levy any distress whatsoever, shall give a copy of his charges and of all the costs and charges of any distress whatsoever, to the person whose goods were taken:—*Held*, that this statute does not apply to the landlord, unless he interfere personally in the distress. *Hart* v. *Leach*, 172.

4. The costs of the distress in the above statute are not confined to the actual distress, but include the subsequent costs of appraisement and sale; per *Parke*, B. *Id.*

5. An action will lie for an excessive distress in taking growing crops. *Piggott* v. *Birtles*, 18.

6. An action for distraining beasts of the plough is not maintainable, if the only other subject of distress is growing crops. *Id.*

EJECTMENT.

See AGENT, 2. PRACTICE, 20.

1. The affidavit to obtain a rule for bail, &c. under the 1 Geo. 4, c. 87, must swear positively to the execution of the lease or agreement by the tenant. *Doe* d. *Beard* v. *Roe*, 131.

2. The notice to quit, under the same statute, must appear to have been given by the authority of the landlord. *Id.*

ELECTION.

See BRIBERY.

ESTATE.

See WILL.

Where A. by indenture of lease conveyed certain premises to M. E., to "hold the same to the said M. E., and her heirs from, &c. for and during the natural lives of the said M. E.'s son J., her daughter M., and A.'s grand-daughter, and the life of the survivor of them," and A. had no grand-daughter till some years after the making of the indenture:—*Held*, that the estate enured during the lives of T. and M. only. *Doe* d. *Pemberton* v. *Edwards*, 137.

ESTOPPEL.

See LANDLORD AND TENANT, 6.

EVIDENCE.

See PLEADING, 12, 13, 14, 15. 17, 18. 20. 23. ACTION, 4. PROMISSORY NOTE, 4, 5. WILL, 4, 5.

1. Knowledge which an attorney obtains in the course of his retainer as such, of the state of a deed, *e. g.* whether, when shewn to him by his client, it was stamped or not, is privileged. *Wheatley* v. *Williams*, 140.

2. The privilege of confidential communications extends to all knowledge acquired by an attorney when acting in that capacity. *Turquand* v. *Knight*, 192.

3. An attorney employed by a bankrupt to raise money for him, will not be allowed to state whether a certain document was at that time in the bankrupt's possession. *Id.*

4. Declarations made by a deceased attesting witness respecting the attested instrument, are not admissible in evidence, though admissions of fraud or forgery on his own part, and though his handwriting has been proved as proof of the instrument. *Stobart* v. *Dryden*, 146.

5. *Held*, that, on a new trial, an admission of the handwriting of an attesting witness was available, though made before the previous trial, and though, in debt on bond, the plea on the former trial was *non est factum*, and on the second trial a special plea that the condition of the bond had been altered after execution. *Langley* v. *Earl of Oxford*, 63.

6. To make an entry in the handwriting of a person deceased, evidence, it must be proved not only to have been in the regular course of business, but to have been made at the time it bears date or immediately after. *Ray* v. *Jones*, 220.

7. It is for the Court to decide, under the facts of each particular case, what is such reasonable search for a lost document as to make secondary evidence of its contents admissible. *M'Gahey* v. *Alston*, 238.

8. In an action for work and labour against a part-owner of a vessel, another part-owner is a competent witness to prove that the defendant has no share in the vessel, with a release. Query, is he without? *Jones* v. *Pritchard*, 199.

9. Materials cannot be recovered under a count for work and labour only. *Heath* v. *Freeland*, 140.

10. Where the particulars of demand stated that the action was brought to recover a bet lost by R., *Held*, that the plaintiff was bound by his particular, and could not shew he had rescinded the bet before the event. *Davenport* v. *Davies*, 119.

11. Where the acceptor of an accommodation bill was sued by an indorsee five years after the bill had become due, and no notice of dishonour had been given to any of the parties to the bill:—*Held*, that, as the plaintiff did not call the party for whose accommodation the bill was given, the jury might fairly presume that the bill, when it became due, was in the hands of the party for whose accommodation it was given, and indorsed afterwards. *Bounsal* v. *Harrison*, 113.

12. Goods were consigned by the plaintiff to the defendant, who was a wharfinger; by the direction of the consignee, and the assent of the plaintiff, the goods were delivered to a third person:—*Held*, that such delivery was a good defence, and admissible under a plea denying the plaintiff's possession of the goods. *Vernon* v. *Shipton*, 195.

13. *Held*, also, that the plaintiff was entitled to a verdict on the plea of not guilty, such a delivery amounting to a conversion in fact, and the plea of not guilty admitting the plaintiff's possession. *Id.*

14. In an action of trover, the defendant pleaded, justifying the taking of the goods under an execution against a third person, averring that the goods were his property and not the property of the plaintiff. The replication averred, that the goods were the property of the plaintiff, and not of the third person: *Held*, that the plea was merely a special traverse of the plaintiff's property in the goods; and that, upon evidence that the goods were the joint property of the plaintiff and the third person, the plaintiff was entitled to a verdict, such an interest being sufficient to enable the plaintiff to maintain trover, and the plea admitting a conversion. *Farrer* v. *Beswick*, 153.

15. In an action on the statute 2 W. & M. sess. 1, c. 5, s. 2, for not paying the overplus above the amount of rent distrained for to the sheriff, &c., the defendant pleaded that he paid the overplus to the plaintiff, (the owner of the goods,) who accepted it in satisfaction of the cause of action:—*Held*, that proof of a payment of a sum of money to the plaintiff in the name of an overplus was not conclusive evidence in support of the plea, but that it was a question for the jury, whether the plaintiff received it in full satisfaction, and, if not, that it was open to the question for them, whether the charges, above which and the rent it was to be overplus, were regular. *Lyon* v. *Tomkies*, 144.

16. In an action against executors, if they plead over, and the verdict pass against them, production of the judgment-roll on a *scire fieri* inquiry before the sheriff, is sufficient *primâ facie* evidence of assets to find a *devastavit*. *Palmer* v. *Waller*, 105.

17. A broker made a contract, and he bought and sold notes:—"We have this day bought of you 100 tons dry palm oil, the above oil to be delivered to the sellers from the *Speedy* or *Charlotte, expected* to arrive about *November* or *December* next." 2. "We have this day sold for you 100 tons of dry palm oil, ex *Speedy* and *Charlotte*, to arrive:"—*Held*, that evidence of mercantile usage was admissible to shew that both these notes had the same meaning, being intended to represent that the oil should arrive by one or other of these vessels, to be delivered from either vessel, at the option of the seller. *Bold* v. *Rayner*, 44.

18. The record is conclusive evidence of the time of the issuing of the writ; but if a wrong date has been inserted, the trial may be set aside, and the record altered. *Whipple* v. *Manley*, 56.

19. In an action for insecurely keeping a mining shaft, issue was joined on the defendant's possession of the shaft. The defendant had stated, that if a miner's jury should say it was his, he would remunerate the plaintiff. The miner's jury gave their verdict in writing, that the shaft was in the possession of the defendant. *Held*, that the finding was admissible in evi-

dence, on the principle on which admissions made by a third person to whom a party refers are admissible. *Sybray* v. *White*, 68.

20. In *indebitatus assumpsit* for goods sold and delivered, evidence is admissible, under the plea of non-assumpsit, to shew that the article was a machine for which nothing was to be paid unless it worked well; and the defendant is entitled to a verdict, if he shews that the machine did not work well. *Groundsell* v. *Lamb*, 28.

21. Proof of acting as a public officer is *primâ facie* evidence of his being legally appointed. *M'Gahey* v. *Alston*, 238.

EXECUTORS.

See ACTION, 2. BONA NOTABILIA. EVIDENCE, 16.

FEME COVERT.

1. A married woman, though the wife of an alien who is residing abroad, and is not shewn ever to have been in *England*, is not personally liable for goods sold to her; at all events, unless she contracted for them as a feme sole. *Barden* v. *De Keverberg*, 201.

2. It is not sufficient that she did not state that she was married at the time she ordered the goods; she must be guilty of some misrepresentation, for the purpose of obtaining credit as a feme sole. *Id.*

FORFEITURE.

See AGREEMENT.

GUARANTEE.

See ACTION, 3.

HIRING AND SERVICE.

See ACTION, 4.

HUSBAND AND WIFE.

See FEME COVERT, 1, 2.

INSOLVENT.

All assignments made with an intention of petitioning the Insolvent Court, are fraudulent and void within 7 G. 4, c. 57, s. 32, though executed more than three months before the party goes to prison. The intention is, in all cases, a question for the jury. *Becke* v. *Smith*, 242.

INTERPLEADER.

See PRACTICE, 33.

JUDGMENT AS IN CASE OF NONSUIT.

See PRACTICE, III.

LANDLORD AND TENANT.

See AGENT, 2. COVENANT, 1, 2. EJECTMENT, 1, 2.

1. Where a tenant gave his landlord notice to quit at *Michaelmas*, 1835, and subsequently made an offer to remain another year, to which the agent of his landlord replied, that H. (the landlord) has directed me to inform you that he could only consent to accept your offer of 420*l.* for the farm from *Michaelmas* next to *Michaelmas*, 1836, subject to the existing covenants, provided I could not find a tenant at the rent it appeared to me to be worth by the 1st of *August*. The tenant having assented to these terms, *Held*, that if the above amounted to a substantive agreement at all, it was an implied condition on the part of the tenant to allow any one wishing to take the farm to go over the land; and, the tenant having refused to do so, the agreement fell to the ground, and the notice to quit at *Michaelmas*, 1835, remained good. *Doe* d. *the Marquis of Hertford* v. *Hunt*, 102.

2. It is not necessary that a notice to a tenant under the stat. 1 G. 4, c. 87, should state it to be signed by the agent of the lessor of the plaintiff. It is sufficient to state that it is signed by the agent of the landlord. *Doe* d. *Beard* v. *Roe*, 48.

3. Nor is it necessary to set out at length what the tenant will be required to do under the statute. *Id.*

4. The custom of the country as to the tenant's way going rights to an allowance for seed and labour on the land, is not excluded by a stipulation in his lease, that, on leaving, he should consume three-fourths of the hay and straw on the land, and bestow the manure therefrom on the land, leaving the unconsumed manure for the landlord, he paying for it. *Hutton* v. *Warren*, 71.

5. A tenant occupied land at the expiration of a lease, with the assent of the lessor, a parson. On the determination of his title, he continued to be tenant to his successor:—*Held*, that he was tenant under the terms of the original lease. *Id.*

6. A lessee entering and holding under a lease not executed by his landlord, is not estopped from shewing such want of execution by the lessor. *Cardwell* v. *Lucas*, 203.

7. By parol, a dwelling-house and premises were demised for a year. The lessee "accepted the said lease, and, by virtue of the said demise, entered upon the demised land." Before and at the time of the demise, eight acres, included in it, had been demised to a third party, in whose possession they were, so that the lessee could not, and did not, enter upon them. *Held*, that the demise was altogether void. *Neale* v. *Mackenzie*, (in error,) 174.

8. A tenant from year to year agreed to buy the freehold of the demised land; after the agreement of purchase, the purchase-money being unpaid, the landlord demanded possession; the tenant said he had bought the land, and he should keep it. *Held*, first, that the agreement for purchase not being absolute, but conditional on a good title being found, it did not put an end to the yearly tenancy; and, secondly, that the assertion of a right to hold by the tenant must be taken to have been made by him in his character of purchaser, and not as tenant; and, therefore, that it was no disclaimer. *Doe* d. *Gray* v. *Stanion*, 154.

LIEN.

A testator devised his estates to trustees, upon trust, to receive the rents and profits, and pay and apply two thirds of them to the plaintiff, and one third to his widow during her life, and after her decease he devised the estates to the plaintiff in fee. The trustees deposited the deeds with the defendant, an attorney, for purposes connected with the trust, who claimed to detain the deeds as a lien for his charges incurred in respect thereof:—*Held*, that he was not entitled to obtain them from the plaintiff on the death of the widow, as the debt incurred was the personal debt of the trustees. *Lightfoot* v. *Keane*, 138.

LIMITATION OF ACTION.

See BANKRUPT, 2. PROMISSORY NOTE, 5.

MALICIOUS ARREST.

The defendant, having reasonable and probable cause for suspecting that A. had made an assault upon him with intent to rob, gave him in charge to a constable. The constable stated that A. was a very respectable man, and not likely to have committed the offence. The defendant, however, persisted in his charge, and he was taken before a magistrate. In an action for a malicious arrest, *Held*, that it was a misdirection to tell the jury, that if the defendant believed the good character given by the constable, and persisted in his charge merely from obstinacy, it put an end to the reasonable or probable cause for taking A. into custody. *Musgrave* v. *Newell*, 91.

MALICIOUS TRESPASS.

See NOTICE OF ACTION.

NOTICE OF ACTION.

See BUILDING ACT.

Where a constable arrested the plaintiff for an offence against the Malicious Trespass Act, 7 & 8 G. 4, c. 30, which he had not seen committed, and of which no complaint had been made to him by the owner of the property:—*Held*, that, although the arrest was illegal, as the constable was acting *bonâ fide* under the act, he was entitled to a month's notice of action. *Ballinger* v. *Ferris*, 111.

OFFICER.

See BOND, 1, 2. EVIDENCE, 21. TROVER.

OUTLAWRY.

A writ of capias, on which proceedings to outlawry were afterwards taken, was delivered to the sheriff on the day the defendant went abroad, with a direction to return the writ *non est inventus;* and a judge's order was also obtained for the return of it in fifteen days; the Court refused to set aside the outlawry, except on the terms of paying the costs, and putting in bail in the alternative to pay the condemnation-money, or render. *Levy* v. *Cloggett*, 152.

PARTICULARS OF DEMAND.

See EVIDENCE, 10.

PARTNER.

Where, by the rules of a club, it appeared to be the intention of the parties that all dealings should be for ready money, and a fund was provided for the committee, whose duty was to "*manage the affairs of the club:*"—*Held*, that the members were not personaly liable for any contracts on credit entered into by the committee. *Fleming* v. *Hector*, 180.

PAROL AGREEMENT.

See BILL OF EXCHANGE, 2.

PLEADING.

See EVIDENCE, 9, 12, 13, 14, 15, 20. PRACTICE, IV.

I. DECLARATION:

1. A declaration is sufficient, though it pursues the old form of describing the plaintiff as a debtor to the king, and concluding with a *quo minus*, though such may be struck out on summons for surplusage. *Alderson* v. *Johnson*, 229.

2. A count for work done by the plaintiff as administrator, may be joined with counts for work done by and account stated with the testator. *Edwards* v. *Grace*, 241.

3. The omission to state a promise to pay in an *indebitatus* count, is not supplied even after verdict, either by the statement at the beginning of the declaration, of its being an action on promises, or by the conclusion, that in consideration of the premises respectively before-mentioned the defendant promised, &c.; the count in question not being included in such promise. *Hayter* v. *Moat*, 189.

4. A declaration on a bill of exchange payable four months after date, need not aver that that period had elapsed before the commencement of the suit; if it state "which period has now elapsed," that is sufficient. *Owen* v. *Waters*, 208.

5. In case of slander of title, a declaration not setting forth the words is bad, after verdict, and the Court will arrest the judgment. *Gutsole* v. *Mathers*, 64.

II. PLEA.

6. A plea pleaded generally must be taken as pleaded to the whole declaration. If such a plea be no answer to one count of a declaration, the proper course is to demur specially. *Putney* v. *Swann*, 216.

7. *Semble*, that though immaterial matter may not make a plea double, a traverse of both the material and immaterial parts of the plea is objectionable on special demurrer, as tending to make uncertain what is the substantial issue to be tried. *Regil* v. *Green*, 1.

8. A plea traversing the damage only is bad. *Porter* v. *Izat*, 54.

9. In an action on a contract that the ship should sail from *Hamburgh*, being tight, staunch, and strong, and proceed to *Lima*, the declaration alleged, by way of breach, that the ship, when she sailed, was not tight, staunch, and strong, and that though she did sail from *Hamburgh*, yet, by reason of her not being tight, &c., she was obliged to put back to *Altona*, and was by reason thereof detained at *Altona* a long space of time:—*Held*, that a plea was bad, traversing that the detention at *Altona* was caused by the vessel not being tight, staunch, and strong. *Id.*

10. A plea to an *indebitatus* count in debt, that when the said sum of, &c., became due and payable, the defendant paid it, according to his contract and liability, should conclude with a verification. *Goodchild* v. *Pledge*, 7.

11. A plea giving express colour in trover is good under the new rules. *Morant* v. *Sign*, 237.

12. Goods sold on a credit unexpired, is a denial of any right of action by the vendor for the price, and therefore need not be specially pleaded under the new rules. *Broomfield* v. *Smith*, 114.

13. A plea to a count for work and labour, that the debt, except as to the sums of, &c., was due on a special contract to work for the disbursements out of pocket, is bad on special demurrer, as amounting to the general issue. *Jones* v. *Nanney*, 24.

14. In an action on a bill of exchange, the sufficiency of the stamp is put in issue by a plea denying the acceptance, and the Court will not allow a distinct plea that the stamp is insufficient. *Dawson* v. *Macdonald*, 215.

15. A set-off must be specially pleaded; it cannot be given in evidence under a plea of *nunquam indebitatus*, with notice of set-off. *Graham* v. *Partridge*, 37.

16. It being admitted that a payment had been made to the plaintiff after action brought, the Court reduced the verdict by that amount. *Richardson* v. *Robertson*, 80.

17. *Qu.* Whether evidence of payment, either before or after action brought, is admissible in evidence in reduction of damages, the only plea being non-assumpsit. *Id.*

18. On the trial of an action of trespass for a false imprisonment, to which not guilty and a justification were pleaded; it appeared that the plaintiff had been detained in custody by force of an attachment lodged with the goaler by the defendant:—*Held*, that the plaintiff ought not to have been nonsuited, but that the detainer by legal process ought to have been proved under a plea of justification. *Bryant* v. *Clutton*, 50.

19. If a writ is issued on the day on which a bill of exchange is due; it is sufficient if the defendant pleads that the bill was not due at the time of commencing the suit. *Wells* v. *Giles*, 209.

20. It is an essential part of a plea of justification of a trespass in an entry to take a party under a *ca. sa.* to state that the outer door is open; therefore, the replication *de injuriâ* puts that fact in issue, and it is unnecessary to set out by a new assignment the abuse of the authority in breaking the outer door. *Kerbey* v. *Denby*, 31.

22. In an action on a false return to a writ of *fi. fa.*, the declaration stated, that the defendants seized and took in execution divers goods, &c., and levied the value, &c. thereout:—*Held*, that the traverse that the defendants did not seize or take and levy thereout, was too large, and that it ought to have been in the disjunctive. *Stubbs* v. *Lainson*, 122.

23. In such an action, where the sheriff returned *nulla bona*, it is sufficient *primâ facie* evidence for the plaintiff, to prove that the sheriff seized the goods. *Id.*

24. Where to debt on bond conditioned for the payment of 1400*l.* the defendants pleaded payment of 800*l.* *post diem*,—*Held* ill on demurrer. *Ashbee* v. *Pidduck*, 116.

25. Where a bond has been given for the payment of money on a certain day by A., B., and C., jointly, and it does not appear on the face of the bond that B. and C. are only sureties, it is no defence in an action on the bond against B. & C. after A.'s death, to plead that A. was the principal, and that the plaintiff had released A.'s executor before bringing the action. *Id.*

26. It is not necessary to set out a breach in debt on a money bond, as the bond creates the debt, and the condition and defeasance must be stated by the defendant. *Id.*

PRACTICE.

See ATTACHMENT. BANKRUPT, 3. COSTS. EVIDENCE, 10. OUTLAWRY, SHERIFF, 1, 2. WILL, 5.

I. AFFIDAVITS.

1. It is no objection to an affidavit of debt sworn before a commissioner, that there was then no title to the affidavit, if it appear in the jurat that it was sworn before a commissioner of the Court in which it was used. The title may be added after it is sworn. *Perse* v. *Browning*, 47.

2. An affidavit of debt is good, although not entitled of any court, and sworn, in *Scotland*, before a person stating himself to be a commissioner for taking affidavits in the Courts of C. P. and Exch. *White* v. *Irving*, 230.

3. It is sufficient if the affidavit of debt, stating the defendant to be indebted to the plaintiff in 40*l.* for the hire of a berth on board a vessel of the plaintiff's, let by the plaintiff to the defendant, and at his request. *Shepherd* v. *O'Bryen*, 120.

4. An affidavit of debt, made by an indorsee of a bill of exchange against the drawer, not shewing a default in the acceptor, is bad. *Crosby* v. *Clarke*, 77.

5. An attachment, though not served, is a proceeding against the sheriff, in which the affidavits to set the attachment aside, should be entitled. *The King* v. *Sheriff of Middlesex*, 221.

6. Affidavits to move for a new trial must be sworn within first four days of term. *Osmar* v. *Richies*, 191.

7. The affidavit to change the venue in a suit may be made by the attorney. *Anon.* 127.

II. BAIL.

8. Bail, in a town cause, may justify in person, although their affidavit of justification is insufficient. *Shane* v. *Spade*, 225.

9. A plaintiff having declared *de bene esse*, and afterwards obtained time to join in demurrer, cannot oppose the defendant's bail. *Bolton* v. *Johnson*, 226.

10. Bail are not discharged by time being given to a principal, within the limits in which regularly final judgment could be obtained against him, although the plaintiff might have signed final judgment by the order of a judge at an earlier period. *Whitfield* v. *Hodges*, 127.

11. An assignment of a bail-bond by the sheriff must be in the presence of two persons, other than the sheriff and the plaintiff. *White* v. *Barrack*, 57.

III. JUDGMENT AS IN CASE OF NONSUIT.

12. If issue be joined in the vacation after *Easter* Term, and no notice of trial given, it is too early to apply for judgment as in a case of a nonsuit in *Michaelmas* Term, where it does not appear that it is a country cause. *Heale* v. *Curtis*, 214.

13. Where the plaintiff pleads issuably, but does not add the *similiter* for the defendant, the latter is not entitled to judgment as in case of nonsuit, unless he has added the *similiter* himself. *Brooke* v. *Lloyd*, 131.

IV. PLEADINGS.

14. A plea which the plaintiff treats as a nullity, is not a waiver of a demand of a plea. *Hough* v. *Bond*, 81.

15. A declaration *de bene esse*, in the original action, is not a waiver of a previously commenced suit on the bail-bond. *Vernon* v. *Turley*, 81.

16. The Court will not, after the time of pleading has expired, allow a defendant, in an action on a check, to add a plea shewing that he executed the check in contravention of stat. 9 G. 4, c. 49, s. 15. *M'Dowall* v. *Lyster*, 226.

17. A plea of *plene administravit* need not be signed by counsel. *Reed* v. *Spurr*, 230.

V. PRISONER.

18. The Court will not interfere in a summary way to discharge a prisoner out of custody at the suit of the assignees of a bankrupt, although the bankrupt swears the debt was fictitious, and there is reason to think that it was so. *Mason* v. *Smith*, 95.

19. The application to the Court to discharge a prisoner out of custody, should be made promptly. It is too late at the end of three months. *Id.*

20. An action of ejectment is within the Small Debtors' Act, 48 G. 3, c. 123. *Doe* d. *Threlfall* v. *Ward*, 223.

VI. PROCESS.

21. It is too early to issue a writ on the day on which a bill of exchange becomes due. *Wells* v. *Giles*, 209.

22. When a writ of summons was indorsed as "issued by W. L. *agent* for the plaintiff:"—*Held*, bad. *Lloyd* v. *Jones*, 121.

23. The blank after "of" in the writ of capias must be filled up with the place and county of the residence, or supposed residence, of the defendant, or wherein the defendant shall be, or shall be supposed to be, as directed by the first section of the stat. 2 W. 4, c. 39. *Rolfe* v. *Swann*, 82.

24. Service of a writ of summons under such circumstances as show that the writ came to the possession of the defendant:—*Held* equivalent to a personal service. *Williams* v. *Piggot*, 115.

25. The Court will not set aside the proceedings because it is sworn that the party served is not the real defendant, but a stranger to the cause; he must wait until judgment is signed. *Griffin* v. *Gray*, 201.

VII. TRIAL.

26. Notices of trial by continuance, and of countermand of notice of trial, must be given the same time before the expiration of the notice of trial. *Forbes* v. *Crow*, 79.

27. In assumpsit, the first count of the declaration stated that the defendant, in consideration that the plaintiff would send a pony to the defendant, and consent to sell it to a third, promised that he had authority from that third person to buy it on his account; the second count stated the defendant's promise to be, to buy the poney himself:—*Held*, that the action was in substance for the price of the pony, and that therefore it might be tried before the sheriff, under the 3 & 4 W. 4, c. 42, s. 17. *Price* v. *Morgan*, 221.

28. *Qu.* Whether the Court will set aside a trial before the sheriff, upon the motion of the party at whose instance the writ of trial was obtained, on the ground that the action was not within the stat. *Id.*

29. Where an issue had been delivered in the common form, as for a trial at *nisi prius*, and subsequently a judge's order had been obtained to try before the sheriff, service of the judge's order, and of notice of trial, is irregular, as the plaintiff ought to have taken out a summons to amend the issue. *Ward* v. *Peel*, 134.

30. Withdrawing a juror at the trial does not put an end to a cause, unless it was clearly the intention of the parties at the time that it should have that effect. *Harris* v. *Thomas*, 197.

31. It is not necessary for the sheriff to return two distinct panels to the writs of *venire facias juratores* and the *distringas*. *Archbold* v. *Smith*, 96.

VIII. MISCELLANEOUS.

32. The Court of Exchequer will review the decision of the judge at *nisi prius*, as to amending the record under 9 Geo. 4, c. 15. *Pullen* v. *Seaven*, 132.

33. The Court in granting an interpleader rule, where the judgment creditor did not appear, reserved to the claimant the right to try an issue with the sheriff as to his having been guilty of misconduct, but not to bring an action of trespass for the original seizure. *Lewis* v. *Jones*, 211.

34. Where plaintiff's counsel, in an undefended action, took a verdict for the principal of a mortgage debt without the interest, the Court refused to increase the verdict. *Baker* v. *Brown*, 223.

35. Where a general verdict is taken, subject to a reference, and the arbitrator assesses the damages on each count separately, if one count be bad, the judgment will be arrested on that count only. *Hayter* v. *Moat*, 189.

36. A writ of error acts as a supersedeas from the time that the notice of its allowance is given; even though it be irregular in not stating the ground of error. *Marstow* v. *Hales*, 210.

37. A plaintiff cannot charge a defendant in execution, after the notice of allowance of a writ of error, though sued out irregularly; he must first move to have it discharged. *Marston* v. *Halls*, 189.

38. In an information of intrusion, the crown may lay the venue in any county, and try it in a different county from that in which the venue is laid. *Attorney-General* v. *Parsons*, 227.

39. The title of the crown may be tried without a previous inquest of office, although the defendant has been in undisturbed possession for twenty years. *Id.*

40. A *tales* may be prayed for the crown in the absence of the A.-G., and without his warrant. *Semble*. *Id.*

PRISONER.

See PRACTICE, V.

PROCESS.

See PRACTICE VI.

PROMISSORY NOTE.

See BILL OF EXCHANGE.

1. No particular words are necessary to make an instrument a promissory note. It is sufficient if a promise can be fairly implied. *Brooks* v. *Elkins*, 200.

2. "I. O. U. 20*l.* to be paid on the 22nd," requires a stamp either as an agreement or a promissory note. *Id.*

3. *Semble*, that an instrument in the following terms is a promissory note:—"I have received the imperfect books, which, together with the cash overpaid on the settlement of your account, amounts to 80*l.* 7*s.*, which sum I will pay in two years." *Wheatley* v. *Williams*, 140.

4. *Semble*, a promissory note stamped as an agreement, with a stamp of equal value to the proper note-stamp, is admissible in evidence, unless it is shewn that it was stamped after it was written. *Id.*

5. *Held*, that such instrument was evidence of an account stated of debts, which would become due in two years, and that the Statute of Limitations did not begin to run until the expiration of two years. *Id.*

SALVAGE.

The words *left by any ship* in stat. 1 & 2 G. 4, c. 75, s. 1, do not apply to articles attached to a vessel, although no one be left in charge of them. *Clarke* v. *Chamberlain*, 217.

SET-OFF.

See AGENT, 3. AGREEMENT. PLEADING, 15.

SHERIFF.

See PLEADING, 22, 23. PRACTICE, 28. 31. 33.

1. The under-sheriff is justified in not allowing any person to practise before him as an advocate, except a barrister or attorney. *Tribe* v. *Wingfield*, 191.

2. The duty of the sheriff, under the new writ of capias, is to arrest the party within a reasonable time. *Brown* v. *Jarvis*, 97.

3. *Query*, whether an action can be sustained against a sheriff for not arresting within a reasonable time, unless some damage can be shewn. *Id.*

4. If the plaintiff gives the sheriff any special directions as to seizing property, he will be liable to an action at the suit of the real owner. *Lewis* v. *Jones*, 211.

SLANDER.

See PLEADING, 5.

STAMP.

See PLEADING, 14. PROMISSORY NOTE, 2. 4.

Held, that as one instrument did not, on the face of it, purport to be an award, an award-stamp was unnecessary. *Sybray* v. *White*, 68.

STATUTE.

A local act of parliament, though containing a clause making it a public act, is not public notice of its powers over land therein mentioned. *Ballard* v. *Way*, 61.

STOCK-JOBBING.

Time-bargains in foreign stock are not illegal, either at common law or under the Stock Jobbing Act, 7 G. 2, c. 28. *Elsworth* v. *Cole*, 220.

TENDER.

See ATTORNEY, 1.

TRESPASS.

See MALICIOUS ARREST. PLEADING, 18. 20. SHERIFF, 4.

If there is an abuse of an authority, by which the party becomes a trespasser *ab initio*, the plaintiff is entitled to recover damages, as well for the part of the injury which would have been justified if there had been no abuse, as for that part which is directly caused by the abuse. *Kerbey* v. *Denby*, 31.

TROVER.

See BILL OF EXCHANGE, 4. EVIDENCE, 12, 13, 14. PLEADING, 11.

Where a public officer received goods, the detention of which was not justified by an act of

parliament, and refused to give them up to the owner without payment of salvage, *Held*, to be evidence of a conversion. *Clarke* v. *Chamberlain*, 217.

VENDOR AND VENDEE.

1. A vendee of land, on discovering that at the time of the contract of sale it was and continued liable to be taken, under a private act of parliament, for the use of a company, is entitled to rescind the contract and to recover back the deposit. *Ballard* v. *Way*, 61.

2. A simple sale of land implies a covenent that the vendor has a good title to the land, but it does not support a count, stating a warranty that he had a good title free from all liabilities whatsoever. *Id.*

WAGES.

See ACTION, 4.

WAIVER.

See AGENT, 2.

WILL.

1. Where a testator made several devises to his nephew, J. S., to his brother, J. S., and to the sons of his brother, J. S., for life, remainder to their children, and by a residuary clause devised the rest of his real property not before disposed of, and concluded his will with these words, "I also entail my land to the S.'s male heir so long as one shall remain:" *semble*, per *Abinger*, L. C. B., and *Parke*, B. that these words are not a sufficient *designatio personæ* to point the individual to take. *Doe* d. *Spencer* v. *Pedley*, 106.

2. The testator held premises to himself and his heirs *pur autre vie*, and after having, by a residuary clause, devised the same to his wife and her heirs, he added this clause, "I do hereby give unto my wife" the premises in question:—*Held*, that although the last clause by itself would give the widow only a life estate, it shewed no such repugnance to the residuary clause as to cut down the estate in fee given by it. *Id.*

3. If a will contains passages cancelled by the testator, they cannot be called in aid to explain the remaining parts of the will, but it must be read as if the cancelled passages were a blank. *Id.*

4. Where a testator devised an estate in fee to *George G.*, the son of *George G.*, and another estate to *George G.*, the son of *G.*; and also, gave a legacy to *George G.*, the son of *John G.*; and another legacy to *George G.*, the son of the said *George G.*:—*Held*, that evidence was admissible to shew who the testator intended by *George G.* the son of *G.* *Doe* d. *Gord* v. *Needs*. 243.

5. The objection is made at *nisi prius*, that the legal estate is in trustees, in respect of a devise to them in fee; and it afterwards appeared, that the trustees only took a chattel interest under the will; the objection cannot be supported in the Court above, that the legal estate is still in the trustees; because if the objection had been made at *nisi prius*, that the trustees' estate was derived from a chattel interest, it might have been shewn that the chattel interest had expired. *Id.*

WINDOWS.

See BUILDING ACT.

WRECK.

See SALVAGE.

END OF VOL. II.

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